111-176

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 255.

LEONARD COVELL, PLAINTIFF IN ERROR,

vs.

SARAH HEYMAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

FILED JUNE 13, 1884.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 255.

LEONARD COVELL, PLAINTIFF IN ERROR,

vs.

SARAH HEYMAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

INDEX.

	Original.	Print.
Writ of error to supreme court	1	1
Citation	3	1
Bond	5	2
Petition for writ of error	7	3
Exhibit A—Affidavit of Sarah Heyman	13	5
Writ of replevin	14	6
Sheriff's return	17	7
Appraisement	18	8
Complaint	23	10
Plea of defendant	26	11
Affidavit of John W. Stone	30	13
Default entered	31	13
Affidavit of John E. More	32	14
Stipulation setting aside default	32	14
Demurrer to plea of defendant	34	15
Reply of defendant	35	15
Demurrer submitted	37	16
Judgment of circuit court	37	16
Clerk's certificate	38	17
Writ of error to circuit court	39	18
Assignment of errors	41	18
Remittitur	42	18

	Original.	Print.
Plea and notice	44	19
Judgment of circuit court	48	21
Bill of exceptions	50	22
Finding of facts	51	22
Amended finding of facts	55	24
Testimony of Adolph Heyman	59	25
Leonard Covell	73	32
S. D. Jackson	85	37
R. S. Parkman	87	38
Record in case of McLean *et al. vs.* Heyman	91	40
Plaintiff's exceptions	107	47
Writ of error to circuit court	109	48
Assignment of errors	111	49
Judgment of supreme court	113	49
Clerk's certificate	114	50
Opinion	115	50
Clerk's certificate	122	53

1 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the Honorable the Judges of the Supreme Court of the State of Michigan, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Sarah Heyman, plaintiff in error, and Leonard Covell, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision
2 was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said defendant in error, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the fourth day of December, in the year of our Lord one thousand eight hundred and eighty.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by N. H. SWAYNE,
Asso. Jus. Sup. Court, U. S.

3 The United States of America to Sarah Heyman, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of Mich-

igan, wherein Leonard Covell is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Noah H. Swayne, Associate Justice of the Supreme Court of the United States, this fourth day of December, in the year of our Lord one thousand eight hundred and eighty.

N. H. SWAYNE,
Asso. Jus. Sup. Court, U. S.

4 UNITED STATES OF AMERICA, }
State of Michigan, West. Dist., } *ss:*

On this 11th day of December, in the year of our Lord one thousand eight hundred and eighty, personally appeared Wm. H. Prescott before me, the subscriber, and makes oath that he delivered a true copy of the within citation to the within-named Sarah Heyman on the 8th day of December, A. D. 1880, and that he served a true copy thereof on Messrs. Norris & Uhle, att'ys for said Heyman, by leaving the same with said Norris in person on the same day.

WILLIAM H. PRESCOTT.

Sworn to and subscribed the 11th day of December, A. D. 1880, before me—

ISAAC H. PARRISH,
United States Comm'ner for the Western District of Michigan.

Endorsed: U. S. Supreme Court. Leonard Covell, p't'ff in error, *vs.* Sarah Heyman, def't in error. Citation.

5 Know all men by these presents, that we, Leonard Covell, as principal, and Frederick W. Wurzburg and Henry Spring, as sureties, are held and firmly bound unto Sarah Heyman, of Grand Rapids, Michigan, in the full and just sum of one thousand dollars, to be paid to the said Sarah Heyman, or to her certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this first day of December, in the year of our Lord one thousand eight hundred and eighty.

Whereas lately, at a session of the Supreme Court of the State of Michigan, in a suit depending in said court between Sarah Heyman as plaintiff and said Leonard Covell as defendant, judgment was rendered against the said Leonard Covell, and the said Leonard Covell having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Sarah Heyman having been issued, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next.

Now, the condition of the above obligation is such, that if the said Leonard Covell shall prosecute said writ to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of—

LEONARD COVELL. [L. S.]
F. W. WURZBURG. [L. S.]
HENRY SPRING. [L. S.]

Approved by—

N. H. SWAYNE,
Ass. Jus. Sup. Court, U. S.

6 UNITED STATES OF AMERICA, *Western District of Michigan*, } *ss:*

I hereby certify that the sureties named in and who subscribed the foregoing bond, Frederick W. Wurzburg and Henry Spring, severally justified before me that they were worth and possessed of property of the value of two thousand dollars and upwards over and above their respective indebtedness, and not exempt from execution. And I certify that I consider them ample sureties for the sum of two thousand dollars each.

Signed this first day of December, 1880, at the city of Grand Rapids, Michigan.

S. L. WITHEY,
Dist. Judge.

Endorsed: U. S. Supreme Court. Leonard Covell, p't'ff in error, *vs.* Sarah Heyman, def't in error. Copy bond.

7 To the Honorable Noah H. Swayne, one of the judges of the Supreme Court of the United States.

The petition of Leonard Covell, a citizen of the United States, respectfully represents: That heretofore, and on the 18th day of November, eighteen hundred and seventy-four, your petitioner was a deputy United States marshal for the western district of Michigan, and that as such he levied, by virtue of an execution issued out of the United States court for the western district of Michigan, on a judgment which said court had jurisdiction to render, on certain personal property in said western district of Michigan, in the possession of the defendant in said writ, as his property.

That on the same day a deputy sheriff of the county of Kent and State of Michigan, took the property on which your petitioner had levied, by virtue of a writ of replevin issued out of the circuit court of the county of Kent, Michigan, being a court organized and existing under the laws of the State of Michigan. That said writ was issued at the suit of Sarah Heyman, who claimed to own the goods, and who was the wife of Adolph Heyman, the defendant in
8 execution. That at the time of the taking of said goods by said writ of replevin the said deputy sheriff of said Kent

county, and the plaintiff therein, knew that your petitioner held such goods as a deputy marshal of the United States by virtue of such execution.

That your petitioner appeared in said court in propria persona, and plead to the jurisdiction thereof; that the circuit court for the said county of Kent sustained the plea to the jurisdiction, and rendered jugment for the defendant; that said plaintiff, in said replevin suit, appealed to the supreme court of the State of Michigan, which court reversed the judgment of the circuit court, and ordered defendant to plead over, and remitted the case again to the circuit court for the county of Kent.

That your petitioner then plead the general issue, and under the practice of the said State court gave notice of the official capacity in which he held the goods. The cause came on for trial in said circuit court, and on the 2d day of February, 1880, a judgment was rendered again for the defendant. Findings of facts were also
9 filed by the circuit judge, (p. 37 of record annexed,) who also, at the request of counsel for plaintiff in replevin, returned the fact that he had refused to make certain findings requested by them, (record, p. 37.) That afterwrads the plaintiff took said cause to the supreme court of the State of Michigan, which court did, on the 13th day of October, 1880, render its judgment (record, p. 81,) reversing the judgment rendered in the court below for the defendant, and directing a judgment to be rendered for the plaintiff for six cents damages and costs of court.

That the annexed is a record of the proceedings in said cause, and of the whole thereof, and that the opinion of said court is annexed, marked B. That by said judgment execution can issue only for costs, which your petitioner avers do not, in both of said courts taken together, exceed the sum of one hundred and fifty dollars.

And your petitioner further shows that the question at issue in said cause is a right under the authority of the United States, and under the statutes of the United States, and under a commission issued under the authority of the United States, and an immu-
10 nity claimed by your petitioner under the statutes of the United States.

That your petitioner deems himself aggrieved by the judgment of the said supreme court, and is informed by his counsel that there is manifest error therein, and he makes this his petition for the purpose of securing the issue, and of a writ of error from the Supreme Court of the United States to the said supreme court of the State of Michigan, that the records of its doings in said cause may be brought before the Supreme Court of the United States; that the records and proceedings thereof being inspected, the Supreme Court may cause that to be done therein to correct that error, which of right and according to the laws and customs of the United States ought to be done.

LEONARD COVELL.

J. W. CHAMPLIN,
Att'y for Petitioner.

UNITED STATES OF AMERICA, }
State of Michigan, County of Kent, } ss:

Leonard Coyell, of said county and State, being of lawful
11 age, and duly sworn, doth depose and say that he has heard read the above and foregoing petition by him subscribed, and knows the contents thereof, and that the same is true in substance and matter of fact.

LEONARD COVELL.

Subscribed and sworn to before me, this 24th day of November, A. D. 1880.

EDWARD W. WITHEY,
Notary Public in and for Kent County, Michigan, in the Western District of Michigan and Southern Division thereof.

STATE OF MICHIGAN, }
County of Kent, } ss:

I, Fred. H. Clark, clerk of said county and of the circuit court thereof, do hereby certify that Edward W. Withey, before whom the above affidavit was sworn to, was, at the date of administering such oath, a notary public in and for said county, duly commissioned, qualified, and sworn, and authorized by the law of said State to administer such oath; that I am acquainted with the handwriting of the said Edward W. Withey, and believe his signature ap-
12 pended to the above certificate is genuine; that the said instrument is executed according to the laws of this State.

In witness whereof I have hereunto set my hand and official seal, at the city of Grand Rapids, in said county, this 24th day of November, A. D. one thousand eight hundred and eighty.

[SEAL.] FRED. H. CLARK, *Clerk.*
By EDWARD B. MOORE, *Deputy.*

13 *Exhibit "A."*

STATE OF MICHIGAN, }
County of Kent, } ss:

Sarah Heyman, of the city of Grand Rapids, in said county, being duly sworn, deposes and says that she is now lawfully entitled to the possession of the property described in the annexed writ of replevin; that the same has not been taken for any tax, assessment or fine levied by virtue of any law of this State, nor seized under any execution or attachment against the goods and chattels of this deponent, the said plaintiff, liable to execution, and that said goods and chattels are unlawfully detained by Leonard Covell, the defendant in this suit named, and further deponent saith not.

SARAH HEYMAN.

Subscribed and sworn to before me, this 18th day of November, A. D. 1874.

J. H. WURZBURG,
Notary Public, Kent County, Mich.

14 STATE OF MICHIGAN, } ss:
County of Kent, }

The circuit court for the county of Kent. In the name of the people of the State of Michigan.

To the sheriff of the county of Kent:

We command you that you do forthwith take into your custody the following goods and chattels, to wit: Seven pieces of bed-ticking, one piece of opera check, one piece of striped shirting, two dozen pieces of cotton cloth, six pieces of cambric cloth, nine pairs of drawers, five pieces of chambria cloth, nine pieces of table linen, nine pieces of sateen twill cloth, one piece of huckaback cloth, two pieces of linen toweling, one piece of opera check cloth, two pieces of cotton cloth, one piece of cassimere, two pieces of cottonade cloth, three pieces of nankeen cloth, twelve pieces of grenadine cloth, twenty wrappers, ten pairs of drawers, eight shirts, eight colored wrappers, three pieces of waterproof cloth, one piece of beaver cloth, eight pieces of bleached cotton cloth, eleven felt skirts, four pieces of Naumkeag sateen cloth, five pieces of linen cloth, two counterpanes, one piece of linen lawn, four pieces of waterproof cloth, nine pieces of paper cambric cloth, one piece of wigging, one piece of
15 flannel, one piece of linsey wolsey cloth, eleven pieces of white flannel cloth, five pieces of assorted opera flannel cloth, one piece of blue flannel cloth, one piece of white corduroy cloth, four pieces of white flannel cloth, one piece of grey flannel cloth, nine pieces of red flannel cloth, three pieces of checked flannel cloth, three pieces of plaid opera flannel, two pieces of orange flannel cloth, three pieces of red flannel cloth, three pieces pieces of summer goods, four pieces of wash poplin cloth, one piece of summer dress goods, one piece of grey flannel, one piece of opera check cloth, one piece of checked ticking, two pieces of rep cloth, twelve pieces of bleached cotton cloth—four hundred and eighty-three yards, nineteen pieces of sheeting—four hundred and ten yards, three pair of blankets, four pieces of cotton flannel cloth, five pieces of Irish linen, one hundred yards of grass cloth, sixty-eight towels, eighteen dozen of toweling, two pieces of grass cloth, fifteen shawls, five pieces of Kentucky jeans, five pieces of cassimere, three pieces of cassimere cloth, ten pieces of satin cloth, five pieces of velouz cloth, one piece of Japanese silk cloth, two pieces of velouz cloth, one piece of Japanese poplin, one piece of white alpaca, two hundred and twenty-nine corsets, six pieces of diaper cloth, fourteen pieces of barred
16 jaconettes cloth—two hundred and nine yards, four pieces of Nansook cloth, two pieces of jaconette's cloth, one piece of

ticking, four pieces of Bishop's lawn cloth, four pieces of tarretan cloth, three pieces of swiss cloth, sixteen pieces of Victoria lawn, three pieces of colored alpaca—forty-eight yards, one hundred and eighty yards of black silk, five pieces of merino—ninety yards, four pieces of Empress cloth—one hundred and twenty-five yards, eighty pounds of zephyr worsted, two show cases and contents, in store occupied by the plaintiff, on Monroe street, in the city of Grand Rapids, in said county, and deliver the same to Sarah Heyman, plaintiff herein, if she shall give you security, as required by law, to prosecute, to affect this writ against Leonard Covell, defendant herein, and to return the aforesaid goods and chattels, if return thereof shall be adjudged, and to pay all such sums of money as may be recovered against her hereupon; and also that you summon the said Leonard Covell to appear before the circuit court for the county of Kent, at Grand Rapids, on the first day of December, 1874 next, at ten o'clock in the forenoon of said day, to answer the said Sarah Heyman, concerning the unlawful detention of the said goods and chattels.

17 Witness the Honorable Birney Hoyt, circuit judge, at Grand Rapids, this 18th day of November, in the year of our Lord one thousand eight hundred and seventy-four.

HOBART H. CHIPMAN,
Clerk.
By W. H. VAN LEENEVEN, JR.,
Deputy Clerk.

STATE OF MICHIGAN, } ss:
County of Kent, }

I do hereby return that by virtue of the within writ I have, on this 18th day of November, A. D. 1874, as within I am commanded, replevied the goods and chattels, as shown in the inventory hereto annexed, which were appraised by C. H. Patten and Martin Olson, disinterested persons, who were by me first duly sworn for that purpose, and whose appraisal is in writing signed by themselves and herewith returned; and I do further return that afterwards, on the 20th day of November, A. D. 1874, I delivered the goods and chattels so replevied by the within-named Sarah Heyman, she, the said Sarah Heyman, having first executed and delivered to me the requisite bond under the statute, with Sarah Heyman, Jacob Barth,

18 and Moses May, in said county, surety. And I do also further return that I did, on the day last aforesaid, according to the command of said writ, summon the within-named Leonard Covell, by delivering a certified copy of said writ to him personally.

Dated the first day of December, A. D. 1874.

ISAAC HAYNES,
Sheriff.
By R. S. PARKMAN,
Deputy Sheriff.

My fees, $20.00.

STATE OF MICHIGAN, } ss:
County of Kent, }

We, the undersigned, two disinterested persons, being first duly sworn by Randall S. Parkman, deputy sheriff of said county, to make a true appraisement of all the property seized by me by virtue of the annexed writ of replevin, do appraise the said articles and parcels of property so replevied, as follows, to wit:

7	pieces ticking	$30 00
1	piece apron check	5 00
1	" striped check	4 50
24	shirts	30 00
	2 dozen pieces of cotton	15 00
19	6 pieces of cambric	24 00
	9 pair drawers	6 75
5	pieces chambria	22 00
9	pieces table linen	55 00
4	" satin twill	25 00
1	piece huckabuck	10 00
2	pieces linen twilling	6 00
7	" crash	20 00
1	piece apron check	15 00
2	pieces cottonade	12 00
1	piece cassimere	12 00
3	pieces cottonade	7 00
1	piece "	5 00
6	pieces "	48 00
3	" Nankeen	12 00
4	" grenadines	35 25
8	" "	12 50
20	ladies wrapps	16 00
10	" drawers	8 00
8	" skirts	4 00
5	colored wrappers	4 00
3	" "	1 88
3	waterproofs	27 50
1	piece beaver	20 00
	8 pieces bleached cotton	20 00
20	11 felt skirts	16 50
	3 pieces Naumkeag sateen	5 00
1	piece " "	3 00
5	pieces linen	50 00
2	small counterpanes	1 50
1	piece linen lawn	10 00
4	pieces waterproof	65 00
8	pieces paper cambric	28 80
1	piece wigging	2 00
1	piece flannel	2 00

11 pieces white flannel		$56 25
5 " opera flannel		25 00
1 piece blue flannel		9 00
1 piece white corduroy		4 00
4 pieces white flannel		9 00
1 piece grey flannel		4 00
9 pieces red flannel		26 25
2 pieces check flannel		20 00
1 piece check flannel		9 00
3 pieces plaid opera flannel		30 00
2 pieces orange flannel		7 00
3 pieces red flannel		6 00
2 pieces leanes		3 00
1 piano spread		6 00
3 pieces summer goods		7 50
21 4 pieces wash poplin		12 00
1 piece summer dress goods		12 00
1 piece grey flannel		3 50
1 piece apron check		5 00
1 piece check ticking		12 00
2 pieces rep		14 00
12 pieces bleached cotton		60 00
410 yards shirting		41 00
3 pair blankets		18 00
158 yards canton flannel		18 00
150 yards Irish linen		93 00
100 yards grass cloth		18 00
1½ dozen towels		1 88
44 pieces toweling		6 60
6 pieces toweling		3 00
18 dozen towels		27 00
2 pieces grass cloth		12 00
15 shawls		60 00
5 pieces Kentucky jean		48 00
100 pieces cassimere		85 00
3½ pieces cassimere		5 00
76 pieces black silk		114 00
32 " "		48 00
4 pieces sateen		6 00
6 pieces sateen		7 50
22 5 pieces valeur		32 50
6 pieces Japanese silk		65 00
2 pieces valeur		19 00
24 yards Japanese poplin		9 00
1 piece white alpaca		6 00
8 pieces black alpaca		48 00
229 corsets		300 00
6 pieces diaper cloth		3 00
14 pieces Bart jaconette		104 00

4 pieces nainsook	$8 00
2 pieces jaconette	7 00
1 piece ticking	2 50
4 pieces Bishop's lawn	14 00
4 pieces tarlatan	12 00
3 pieces muslin (Swiss)	10 00
16 pieces Victoria lawn	90 50
3 pieces colored alpaca	5 50
5 pieces merino	70 00
4 pieces empress	62 50
80 pounds zephyr	80 00
2 show cases and contents	200 00
Total	$2,845 16

C. H. PATTERN,
MARTIN OLSON,
Appraisers.

23 NOVEMBER 19*th*, 1874.

Received and filed December 1st, 1874.

HOBART H. CHIPMAN,
Clerk,
By W. H. VAN LEENWEN, JR.,
Deputy.

State of Michigan, the Circuit Court for the County of Kent.

COUNTY OF KENT, *ss:*

Leonard Covell, defendant herein, was summoned to answer Sarah Heyman, plaintiff herein, of a plea of replevin, wherefore he unlawfully detains certain goods and chattels, the property of the said plaintiff, described in the writ of replevin in this cause, and hereafter set forth; and thereupon the said plaintiff, by Norris, Blair & Stone, her attorneys, complains against the said defendant, for that the said defendant, on the eighteenth day of November, 1874, at the city of Grand Rapids, in the county of Kent aforesaid, received the goods and chattels above mentioned, to wit: 7 pieces of bed-ticking, 1 piece apron check, 1 piece striped shirting, 2 dozen shirts, 2 dozen pieces cotton cloth, 6 pieces cambric cloth, 9 pairs drawers, 5 pieces Chambria cloth, 9 pieces table linen, 9 pieces satin twill cloth,
24 1 piece huckabuck cloth, 2 pieces linen toweling, 2 pieces crash toweling, 1 piece apron check cloth, 2 pieces cottonade cloth, 1 piece cassimere, 10 pieces cottonade cloth, 20 wrappers, 10 pair of drawers, 8 skirts, 8 colored wrappers, 3 pieces waterproof cloth, 1 piece beaver cloth, 8 pieces bleached cotton cloth, 11 felt skirts, 4 pieces Naumkeag sateen, 5 pieces linen cloth, 2 counterpanes, 1 piece linen lawn, 4 pieces waterproof cloth, 9 pieces paper cambric cloth, 1 piece wigging, 1 piece flannel, 1 piece linsey-wolsey

cloth, 11 pieces white flannel cloth, 3 pieces assorted opera flannel cloth, 1 pieces blue flannel cloth, 1 piece white cording cloth, 4 pieces white flannel cloth, 1 piece grey flannel cloth, 9 pieces red flannel cloth, 3 pieces checked flannel cloth, 3 pieces plain opera flannel cloth, 2 pieces orange flannel cloth, 3 pieces red flannel cloth, 3 pieces linsey-wolsey cloth, 1 piano spread, 3 pieces summer goods, 4 pieces wash poplin cloth, 1 piece summer dress goods, 1 piece grey flannel, 1 piece apron check cloth, 1 piece check ticking, 2 pieces rep cloth, 12 pieces bleached cotton cloth—403 yards, 19 pieces sheeting—410 yards, 3 pair blankets, 4 pieces cotton flannel cloth, 5 pieces Irish linen, 100 yards grass cloth, 68 towels, 10 dozen twilling, 2 pieces grass cloth, 15 shawls, 5 pieces Kentucky jean, 5 pieces cassimere, 3 pieces cassimere cloth, 10 pieces satin cloth, 5 pieces valeur cloth, 6 pieces Japanese silk cloth, 2 pieces valeur cloth, a piece Japanese poplin, 1 piece white alpaca, 8 pieces black alpaca, 229 corsets, 6 pieces diaper cloth, 14 pieces barred jaconette cloth—209 yards, 4 pieces Nainsook cloth, 2 pieces jaconette cloth, 1 piece ticking, 4 pieces Bishop's lawn cloth, 4 pieces tarlatane cloth, 3 pieces Swiss cloth, 16 pieces of Victoria lawn, 3 pieces colored alpaca—48 yards, 108 yards black sick, 5 pieces of marine—90 yards, 4 pieces empress cloth—125 yards, 80 pounds zephyr worsted, 2 show-cases and contents, in store occupied by plaintiff on Monroe street, in the city of Grand Rapids, in said county, of great value—to wit, of the value of ten thousand dollars—being of the goods and chattels of the said plaintiff, to be delivered to the plaintiff when the defendant should be thereunto afterwards requested; but that the defendant, although often requested so to do, has not delivered the the goods and chattels above mentioned to the plaintiff, but has unlawfully detained the same, to the damage of the plaintiff of ten thousand dollars, and therefore she brings suit, etc.

NORRIS, BLAIR & STONE,
Plaintiff's Attorneys.

Received and filed December 5th, 1874.

HOBART H. CHIPMAN,
Clerk.
By W. H. VAN LEENWEN,
Deputy Clerk.

State of Michigan, the Circuit Court for the County of Kent.

LEONARD COVELL *ads.* SARAH HEYMAN.

And the said defendant, in his own proper person, comes and says: That this court ought not to have or take further cognizance of the action aforesaid, because he says that at and prior to the commencement of the above-entitled cause, and at and prior to the time of the issuing and testing of the execution hereinafter referred to, and for more than six months continuously next prior to the commencement of said suit, James Henry had been United States marshal for

the western district of Michigan, and acting as such, and Leonard Covell, the defendant in this suit, during the time and times aforesaid, had been, and at the time of the commencement of this suit, and at the time of the issuing and testing of the execution
27 hereinafter mentioned, was the deputy, servant, and agent of the said James Henry, United States marshal, as aforesaid, and acting as such.

That an execution issued out of the circuit court of the United States of America, for the western district of Michigan, under the seal of said court, tested on the 9th day of November, A. D. 1874, and of the independence of the United States the ninety-ninth, and returnable on the first Tuesday of February next ensuing, which execution was in the usual form, and regularly made out, signed and sealed and directed to the marshal of the western district of Michigan, commanding him that of the goods and chattels, and for want thereof, then of the lands and tenements of Adolph Heyman, in said district, he cause to be levied and made the sum of two thousand and eighty-nine dollars and four cents, which James McLean and Henry H. Statesbury, surviving partners, etc., lately in the circuit court of the United States for the western district of Michigan, recovered against him for and on account of the non-performance of certain promises and undertakings, and also the sum of
28 thirty-one dollars and ten cents, which were awarded by the said court to the said James McLean and Henry H. Statesbury, for their costs and charges by them about their suit in that behalf expended, whereof the said Adolph Heyman was, on the 28th day of October, A. D. 1874, convicted, as appears of record; which execution was delivered to the said United States marshal to be executed on, to wit, the ninth day of November, A. D. 1874, and was received by this defendant on the 18th day of November, A. D. 1874, as agent, deputy, and servant of the said James Henry, marshal as aforesaid, and in accordance with the command thereof, said defendant did, acting as, and being at the time the deputy of the said James Henry, United States marshal for the western district of Michigan, in the execution of said writ, and by virtue of its authority, seize and levy upon the goods and chattels and personal property described in the writ and declaration in the above-entitled cause, and at the time of the commencement of this action, he, this defendant, had seized, taken into his possession, and held said goods and chattels, and each and every of them, and was in full possession thereof under and by virtue of the said process of the circuit
29 court of the United States of America for the western district of Michigan as aforesaid, and that the only detention or taking possession of said goods, described in the writ and declaration in this suit by this defendant, was by virtue of the process of the circuit court of the United States, and as deputy, servant, and agent of the said James Henry, United States marshal as aforesaid, and this defendant says that said goods and chattels were, on the 18th day of November, A. D. 1874, taken out of the possession of the said

defendant, when so holding the same, with force and arms, and against the consent and protest of this defendant, by Randall S. Parkman, acting as deputy of Isaac Haynes, the sheriff of the county of Kent, under color of the writ of replevin in this cause, and knowing the premises.

And this the said defendant is ready to verify. Wherefore he prays judgment whether this court can or will take further cognizance of the action aforesaid.

LEONARD COVELL.

STATE OF MICHIGAN, } ss:
County of Kent, }

Leonard Covell, of said county, being of lawful age and
30 duly sworn, doth depose and say that he is the defendant in the above-entitled cause; that he has heard read the above plea and knows the contents thereof, and that said plea is true in substance and fact, and further deponent saith not.

LEONARD COVELL.

Subscribed and sworn to before me, this 30th day of December, A. D. 1874.

HORACE TOMPKINS,
Notary Public, Kent County, Michigan.

Received and filed December 30th, 1874.

HOBART H. CHIPMAN, *Clerk.*
By W. H. VAN LEENWEN, JR, *Deputy Clerk.*

The Circuit Court for the County of Kent.

SARAH HEYMAN *vs.* LEONARD COVELL.

KENT COUNTY, ss:

John W. Stone, being duly sworn, deposes and says that he is one of the attorneys for the plaintiff in the above-entitled cause; that the writ in said cause was returnable on the first day of December, 1874, and was returned personally served; that on the 5th day of December, 1874, a declaration was duly filed therein; that on the
31 21st day of December, 1874, Champlin, Butterfield, and Fitzgerald appeared as defendant's attorney herein by serving on plaintiff's attorneys a notice of retainer; that on the same day a copy of the declaration was duly served on said defendant's attorneys; that more than twenty days have elapsed since the service upon said defendant's attorneys of a copy of said declaration, and that said defendant's attorneys have failed and neglected to plead or demur to said declaration.

J. W. STONE.

Subscribed and sworn to before me January 12th, 1875.

LYMAN D. FOLLET,
Notary Public, Kent County, Michigan.

Received and Filed December 13th, 1875.

HOBART H. CHIPMAN, *Clerk.*

State of Michigan, the Circuit Court for the County of Kent.

SARAH HEYMAN
vs.
LEONARD COVELL. } January 13th, 1875.

In this cause, on filing affidavit showing due service on the attorneys for the defendant of a copy of the declaration filed
32 herein, and more than twenty days having elapsed since said service, and said defendant's attorneys having neglected and failed to plead or demur thereto, on motion of Norris, Blair, and Stone, attorneys for plaintiff, it is ordered that the default of said defendant in not pleading be, and the same is, hereby entered.

NORRIS, BLAIR & STONE,
Attorneys for Plaintiff.

State of Michigan, the Circuit Court for the County of Kent.

LEONARD COVELL *ads.* SARAH HEYMAN.

KENT COUNTY *ss*:

John E. More, of said county, being duly sworn, says that on the 30th day of December, A. D. 1874, he served a copy of the plea in abatement, filed by the defendant in the above cause, on Messrs. Norris, Blair, and Stone, the attorneys for the plaintiff in the above cause, by delivering the same to L. D. Norris in person, one of said attorneys, and further deponent saith not.

JOHN E. MORE.

Subscribed and sworn to before me, this 14th day of January, A. D. 1875.

33 JESSE PRATT,
Notary Public, Kent County, Michigan.

The Circuit Court for the County of Kent.

SARAH HEYMAN *vs.* LEONARD COVELL.

It appearing that the default of the said defendant for want of a plea, which was entered on the 13th day of January last, was occasioned by a misapprehension of facts as to the condition of the case in the office of the attorneys for said defendant, it is hereby stipulated that said default be, and the same is hereby, vacated and set

aside, and that the said plaintiff's attorneys have two days in which to demur to the plea in abatement filed in said cause, and that said demurrer be filed, and a copy thereof served on said defendant's attorneys.

Dated April 28th, 1875.

NORRIS, BLAIR & STONE,
Attorneys for Plaintiff.
CHAMPLIN, BUTTERFIELD & FITZGERALD,
Attorneys for Defendant.

Received and filed April 28th, 1875.

34 W. H. VAN LEENWEN, JR.,
Deputy Clerk.

State of Michigan, the Circuit Court for the County of Kent.

SARAH HEYMAN *vs.* LEONARD COVELL.

And the said plaintiff, by Norris, Blair & Stone, her attorneys, comes and says, that the said plea of the said defendant, and the matters therein contained, in the manner and form as the same are pleaded and set forth, are not sufficient in law to quash the said writ of the said declaration, and that she, the said plaintiff, is not bound by the law of the land to answer the same, and this she is ready to verify.

Wherefore, for want of a sufficient plea in this behalf, the said plaintiff prays judgment, and that the said defendant may answer further to the said declaration.

And the said plaintiff, according to the rules and practice of this court, states and shows to the court here the following causes of demurrer to the said plea, that is to say:

1. For that the said defendant hath by his said plea afore-
35 said admitted himself to be the person named the defendant in and by the aforesaid declaration of her, the said plaintiff.

2. And for that the said defendant in and by his said plea has admitted that he was in possession of the goods and chattels described in the said writ and declaration at the time of the commencement of this suit.

3. And also for that the matter set forth in said plea is matter of defence upon said trial upon the merits, and not proper matter to plead in abatement.

4. And also for that the said plea is in other respects informal and insufficient.

NORRIS, BLAIR & STONE,
Plaintiff's Attorneys.

Received and filed April 28th, 1875.

W. H. VAN LEENWEN, JR.,
Deputy Clerk.

State of Michigan, the Circuit Court for the County of Kent.

LEONARD COVELL *ads.* SARAH HEYMAN.

36 And the said defendant saith that the said plea of the said defendant and the matters therein contained are sufficient in law to quash the said declaration, and which said plea, and the matters therein contained, the said defendant is ready to verify and prove, as the court here shall direct, etc.

Wherefore, as the said plaintiff has not denied, nor in any manner answered the said plea, the said defendant, as before, prays judgment of the said declaration, and that the same may be quashed.

LEONARD COVELL, *In person.*

Dated Grand Rapids, May 8th, 1875.

CHAMPLIN, BUTTERFIELD & FITZGERALD,
Of Counsel.

Received and filed May 8th, 1875.

W. H. VAN LEENWEN, JR.,
Deputy Clerk.

State of Michigan, the Circuit Court for the Counnty of Kent.

At a session of said court held at the court-house in the city of Grand Rapids, in said county, on the nineteenth day of July, A. D. one thousand eight hundred and seventy-five.

Present Hon. Birney Hoyt, circuit judge.

37 SARAH HEYMAN *vs.* LEONARD COVELL. } Replevin.

In this cause the same having been brought before the court on the demurrer to the plea in abatement filed herein, after hearing argument of counsel the same was submitted to the court for consideration.

BIRNEY HOYT,
Circuit Judge.

State of Michigan, the Circuit Court for the County of Kent.

At a session of said court held at the court-house in the city of Grand Rapids, in said county, on the twenty-fourth day of July, A. D. one thousand eight hundred and seventy-five.

Present, Hon. Birney Hoyt, circuit judge.

SARAH HEYMAN *vs.* LEONARD COVELL. } Replevin.

In this cause the same having been heretofore submitted to the

court for consideration on the demurrer to the plea filed
38 herein, after mature deliberation had, it is ordered and adjudge by the court now here, that said demurrer be, and the same is hereby, overruled. And it is further ordered and adjudged by the said court now here that said defendant is not guilty of unlawfully withholding and detaining from the said plaintiff the goods and chattels mentioned in manner and form as the said plaintiff hath in his declaration in this suit alleged.

Therefore, on motion of defendant's attorneys, it is ordered and adjudged by the said court that the said plaintiff take nothing by her said suit, and that the said defendant have a return of the said goods and chattels.

And it is further ordered and adjudged by the said court, that the said defendant do recover against the said plaintiff his costs and charges by him about the defence in this behalf expended, to be taxed, and that said defendant have execution therefor.

BIRNEY HOYT,
Circuit Judge.

Certificate of Record.

[SEAL.] STATE OF MICHIGAN, }
County of Kent. }

39 I, Hobart H. Chipman, clerk of the circuit court for said county, do hereby certify that the above and foregoing is a true and compared copy of an original record and files now of record and on file in the office of the clerk of said county and court, and the whole of such original record.

In witness whereof, I have hereunto caused the seal of said court to be affixed, at the city of Grand Rapids, this 12th day of June, A. D. 1876.

HOBART H. CHIPMAN, *Clerk.*
By WESLEY W. HYDE, *Deputy.*

Writ of Error.

The people of the State of Michigan to the judge of the Circuit Court
[SEAL.] in and for the County of Kent, Greeting:

Because in the record and proceedings, and also in the giving of judgment, in a plaint which was in our said circuit court before you between Sarah Heyman, plaintiff, and Leonard Covell, defendant, in a plea of error, manifest error hath intervened, to the great dam-
age of the said Sarah Heyman, as by her complaint we are
40 informed, we being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid, and in this behalf do command you, that if judgment be thereupon given, then you send to our justice of our supreme court of judicature, distinctly and openly under

your seal, the record and proceedings of the plaint aforesaid, with all things concerning the same, and this writ, so that they may have them at the court-house in the city of Lansing, on the fifteenth day of June next, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon for correcting that error what of right and according to the law and custom of the State of Michigan ought to be done.

Witness the Honorable Thomas M. Cooley, chief justice of our supreme court at Lansing, the ninth day of May, in the year of our Lord one thousand eight hundred and seventy-six.

JOHN C. SQUIRES,
Clerk of the Supreme Court.
By H. D. PUGH,
Deputy Clerk.

41 To the Supreme Court of the State of Michigan:

The execution of the within writ appears by the transcript of record hereto annexed.

Dated June 12th, 1876.

HOBART H. CHIPMAN, *Clerk.*
By WESLEY W. HYDE, *Deputy Clerk.*

State of Michigan, Supreme Court.

SARAH HEYMAN, Plaintiff in Error,
vs.
LEONARD COVELL, Defendant in Error.

And now comes Sarah Heyman, plaintiff in error, by Norris & Uhl, her attorneys, and by way of assigning error upon the record herein, says:

I.

It was error to overrule the demurrer interposed to the plea of abatement filed herein.

II.

It was error to adjudge the defendant below not guilty of unlawfully withholding and detaining from the said plaintiff below
42 the goods and chattels mentioned in the writ and declaration in his cause.

III.

It was error to adjudge that plaintiff below take nothing by her said suit.

IV.

It was error to adjudge that the defendant below have return of the goods and chattels in said writ and declaration mentioned.

V.

It was error to adjudge that the defendant recover his costs and charges of the plaintiff below to be taxed, and that he have execution therefor.

NORRIS & UHL,
Attorneys for Plaintiff in Error.

Remittitur.

At a session of the supreme court of the State of Michigan, held at the supreme court rooms, in the city of Lansing, on the tenth day of April, in the year one thousand eight hundred and seventy-seven.

Present: The Honorable Thomas M. Cooley, chief justice;
43 James V. Campbell, Isaac Marstin, Benjamin F. Graves, associate justices.

SARAH HEYMAN, Pl't'ff in Error,
vs.
LEONARD COVELL, def't in Error.

The record and proceedings in this cause having been removed to this court by a writ of error, issued to the circuit court for the county of Kent, and the same, and the matters in error assigned, having been seen and inspected and duly considered by the court, and it appearing to this court that in said record and proceedings, and in the giving of judgment in said circuit court, there is manifest error, therefore, it is ordered and adjudged by the court, that the judgment of said circuit court for the county of Kent be, and the same is hereby, vacated and held for naught, and the demurrer to the plea sustained, defendant to answer over according to the rules of the court, and that the said plaintiff in error do re-
44 cover of and from the said defendant in error costs to be taxed, and that the cause be remanded to the court below for a new trial.

STATE OF MICHIGAN, *ss:*

I, H. D. Pugh, deputy clerk of the supreme court of the State of Michigan, at Lansing, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order. [SEAL OF SUPREME COURT.] In testimony whereof, I have hereunto set my hand and affixed the seal of the said supreme court, at Lansing, this 4th day of June, in the year of our Lord one thousand eight hundred and seventy-seven.

W. D. PUGH,
Deputy Clerk of the Supreme Court at Lansing.

Plea and Notice.

State of Michigan, the Circuit Court for the County of Kent.

LEONARD COVELL *ads.* SARAH HEYMAN.

45 And now comes the said defendant by Roger W. Butterfield, his attorney, and demands a trial of the matters set forth in plaintiff's declaration.

ROGER W. BUTTERFIELD,
Attorney for Defendant.

GENTLEMEN: You will please take notice that the defendant on the trial of the above-entitled cause will give in evidence and insist under the general issue above pleaded, that at, and prior to the time of the commencement of the above-entitled cause, and at, and prior to the time of the issuing and testing of the execution hereinafter referred to, James Henry had been, and then was, United States marshal for the western district of Michigan, and acting as such, and Leonard Covell, the defendant in this suit, during the time and times aforessid, had been, and at the time of the commencement of this suit, and at the time of issuing and testing of the execution hereinafter mentioned, was the deputy, servant, and agent of the said James Henry, United States marshal as aforesaid, and acting as such. That an execution issued out of the circuit court of the United States of America, for the western district of Michigan, under the seal of said court, tested on the ninth day of November, A. D. 1874, and of the independence of the United States the
46 ninety-ninty, and returnable on the first Tuesday of February next ensuing, which execution was in the usual form, and regularly made out, signed and sealed, and directed to the marshal of the western district of Michigan, commanding him that of the goods and chattels and for want thereof, then of the lands and tenements of Adolph Heyman in said district, he cause to be levied and made the sum of two thousand and eighty-nine dollars and four cents; which James McLean and Henry H. Stotesbury, surviving partners, etc., lately in the circuit court of the United States for the western district of Michigan, recovered against him, and on account of the non-performance of certain promises and undertakings; and also the sum of thirty-one dollars and ten cents, which were awarded by the said court to the said James McLean and Henry H. Stotesbury, for their costs and charges by them about their suit, in that behalf whereof the said Adolph Heyman was, on the 28th day of October, A. D. 1874, convicted, as appears of record, which execution issued on the judgment of a court having full jurisdiction of the parties and of the subject matter in controversy; the said plaintiffs above named being non-residents of the State of Michigan, and being citizens of the State of New York, and the said defendant being a resident of the State of Michigan, and

which execution was delivered to the said United States
47 marshal to be executed on, to wit, the ninth day of November, A. D. 1874, and was received by this defendant on the eighteenth day of November, A. D. 1874, as agent, deputy, and servant of the said James Henry, marshal as aforesaid. And in accordance with the command thereof said defendant did, acting as and being at the time the deputy of the said James Henry, United States marshal of the western district of Michigan, in the execution of said writ, and by virtue of its authority, seize and levy upon the goods and chattels and personal property described in the writ and declaration in the above-entitled cause. And at the time of the commencement of this action this defendant had seized, taken into his possession, and held said goods and chattels and each and every of them, and was in full possession thereof under and by virtue of the said process of the United States of America for the western district of Michigan, as aforesaid. And that the only detention or taking possession of said goods described in the writ and declaration in this suit by the defendant was by virtue of the process of the circuit court of the United States for the western district of Michigan under a valid judgment then subsisting; said court having full jurisdiction of the parties thereto and the subject-
48 matter thereof, and as deputy agent of the said James Henry, United States marshal, as aforesaid. And this defendant says that said goods and chattels were, on the eighteenth day of November, A. D. 1874, taken out of the possession of the said defendant when so holding the same with force and arms, and against the consent and protest of this defendant, by Randall S. Parkman, acting as deputy and servant of Isaac Haynes, the sheriff of the county of Kent, under color of the writ of replevin in this cause, he well knowing the premises and the character and the nature of the possession of said property of the defendant in this cause.

ROGER W. BUTTERFIELD,
Attorney for Defendant.

To Messrs. NORRIS & UHL,
Attorneys for Plaintiff.

Judgment.

The Circuit Court for the County of Kent.

At a general term of the circuit court for the county of Kent, continued and held at the court house in the city of Grand Rapids, in said county, on the second day of February, in the year of our Lord one thousand eight hundred and eighty.

Present: The Hon. Birney Hoyt, circuit judge.

Court here opened for business in due form.

49 SARAH HEYMAN *vs.* LEONARD COVELL.

In this cause, on filing the written findings of fact and law of the

circuit judge made on, to wit, the 4th day of August, A. D. 1879, as the same were afterwards on, to wit, the 16th day of December, A. D. 1879, amended under the rules and practice in that behalf provided, and on motion of Roger W. Butterfield, attorney for the defendant, it is ordered that judgment be, and the same hereby is, entered on such findings of fact and law as the same was amended, as aforesaid, and in favor of said defendant and against said plaintiff: that the said plaintiff take nothing by her suit, and that the said defendant do go therefor without day, and that he have a return of the goods and chattels in the said plaintiff's declaration specified; and it is further ordered that the said defendant do recover against said plaintiff his costs and charges by him about his defense in this behalf expended to be taxed, and that the said defendant have execution therefor.

BIRNEY HOYT, *Circuit Judge.*

50 SARAH HEYMAN, Plaintiff in Error,
vs.
LEONARD COVELL, Defendant in Error.

State of Michigan, the Circuit Court for the County of Kent.

Bill of Exceptions.

At a session of said court, held at the court house, in the city of Grand Rapids, in said county, on the 23d day of October, A. D. 1877, before the Hon. Birney Hoyt, circuit judge of the said circuit.

The issue joined between the parties in this cause came on to be tried by the court without a jury, at which day came there, as well the said plaintiff, as the said defendant, by their respective attorneys, and upon the trial of the issue aforesaid the aforesaid counsel offered witnesses and introduced record testimony, all of which is returned with my findings of fact and law. All evidence having been therein given as aforesaid by plaintiff and defendant, said cause was submitted to the court, who thereupon took the same under ad-
51 visement, and afterwards, to wit, on the 4th day of August, A. D. 1879, at the request of the defendant, filed herewith his findings of fact and law in the words and figures following, to wit:

State of Michigan, the Circuit Court for the County of Kent.

SARAH HEYMAN *vs.* LEONARD COVELL.

This is an action of replevin for the recovery of certain dry goods, clothes, etc., alleged to have been taken from plaintiff by defendant. The declaration is an ordinary declaration in replevin. The plea is the general issue with notice that defendant was a deputy marshal of the United States court for the western district of Michigan, and as such was in possession of the goods described in declaration under an execution issued out of the United States court for the western district of Michigan on a judgment, which said court had juris-

diction to render. And that defendant Covell informed the sheriff
at the time of the service of the writ of replevin of the right
52 under which he held, and that he had levied on this as the
property of the defendant in said writ; that said goods were taken against the consent of said defendant Covell by a deputy sheriff of the county of Kent and State of Michigan, an officer of the State of Michigan, by virtue of the writ of replevin in this cause. I find the facts as follows:

In January, 1874, Adolph Heyman, the husband of the plaintiff in this suit, was the owner of a stock of goods, of which the articles in question in this suit formed a part, at Quincy, Illinois.

At or about that date he failed in business, and made an assignment. A sale was made by the assignee of the stock of goods to a brother of the plaintiff, who made a present of them to plaintiff. That afterwards, and in May, 1874, the said stock was removed to Grand Rapids, Michigan, and placed in a store there. The name of S. Heyman was over the door, and the business was carried on by Adolph Heyman in his wife's name and as her agent.

On July 9th, A. D. 1874, James McLean and Henry W. Stotesbury,
as surviving partners of Cochran, McLean & Co., who were
53 then residents and citizens of the State of New York, brought
an action against Adolph Heyman, who was then a citizen of the State of Michigan and a resident of the western district of Michigan, for the purchase price of goods sold to said Heyman shortly before his assignment in Illinois, and after personal service of process therein and an appearance by him, recovered a judgment against him of two thousand eighty-nine and four-hundredths dollars, and $31.10 costs, in the United States circuit court for the western district of Michigan. On this judgment an execution, regular and in the usual form, was issued out of said United States court, dated November 9th, 1874, and returnable the first Tuesday of February, 1875, directed to the United States marshal, commanding him to satisfy said judgment and costs, etc., and which execution came to the hands of Leonard Covell, who was then and there acting as, and being a deputy of James Henry, marshal of the United States for the said western district of Michigan.

That in the execution of said writ, he afterwards, and on the 18th
day of November, 1874, and during the life of said writ, seized
54 the property described in plaintiff's declaration as the property of Adolph Heyman, the defendant in said writ.

That at the time he found the defendant, Adolph Heyman, in charge thereof, and was then informed by him that plaintiff claimed the goods, and was informed by the attorney of the plaintiff soon after the seizure of said goods that plaintiff claimed them.

That afterwards said goods were taken from the possession of the defendant by Randall S. Parkman, a deputy sheriff of the county of Kent and State of Michigan, and as officer of the State of Michigan under the writ of replevin in this cause.

That at time of the seizure of said goods the said deputy sheriff

was informed that this defendant held said goods by virtue of an execution from the circuit court of the United States for the western district of Michigan, and had levied upon them, as the property of the defendant named in said execution.

That said goods mentioned in the plaintiff's declaration were at the time in which they were replevied in this cause, in the hands of the defendant, as deputy marshal of the western district of
55 Michigan, having been seized as the property of the defendant, Adolph Heyman, and being then held by him by virtue of a writ of execution issued out of said court on a valid judgment, which said court had jurisdiction to render; and that at the time of such seizure, the defendant claimed said goods under said levy, and notified the officers of the State of Michigan that he held them under said levy, and by virtue of the process of the United States court for the western district of Michigan. As a conclusion of law, I find that defendant is entitled to a judgment for the return of the property, with costs of suit.

BIRNEY HOYT, *Circuit Judge.*

Which findings of fact and law were, at the request of plaintiff afterwards, to wit, on the 16th day of December, A. D. 1879, and in pursuance of the order of this court first had and obtained, amended in the words and figures following, to wit:

Amended Findings of Facts.

State of Michigan, the Circuit Court for the County of Kent.

56 SARAH HEYMAN *vs.* LEONARD COVELL.

Upon request of the plaintiff by her attorneys, I further find by way of amendment to my former finding, that on the conclusion of the trial in this cause, the plaintiff's attorney presented to me a written finding of facts and law (which they then requested me to find as the facts and law of this case, and which I did afterwards refuse to find,) in the words and figures following, to wit:

Findings of Fact and Law.

State of Michigan, the Circuit Court for the County of Kent.

SARAH HEYMAN
vs. } Replevin.
LEONARD COVELL.

This is an action of replevin, brought by the plaintiff against the defendant, to recover possession of a stock of dry goods and notions taken from her by the defendant. The declaration is an ordinary declaration in replevin. The plea is the general issue with notice. The cause was tried by she court without a jury.
57 I find the facts as follows:

That on the 18th day of November, 1874, the plaintiff was the absolute, sole, and unconditional owner of a stock of goods taken under the writ of replevin in this cause. That the defendant at the date aforesaid, and on the 9th of said November, was a deputy marshal of the western district of Michigan. That on the 28th day of October, 1874, James McLean and another who were citizens of the State of New York, recovered judgment in the circuit court of the United States for the western district of Michigan, against one Adolph Heyman, the husband of plaintiff, a citizen of the State of Michigan, residing in the western district thereof, for the sum of two thousand dollars and upwards.

That an execution issued on said judgment directed to the marshal of the said western district of Michigan, tested November 9th, 1874, and returnable on the first Tuesday of February thereafter.

That during the forenoon of the 18th day of November, aforesaid, the defendant went to plaintiff's store in Grand Rapids, and levied the execution aforesaid, upon a portion of the goods therein contained, which he separated from the balance of the stock.

58 That he demanded the key of the store, but it was not given up. That during the entire day the sales proceeded as usual, except of that portion thereof which had been levied upon; that the defendant when served with the writ of replevin did not assert or claim that the title under the execution was superior to that under the writ of replevin from the State court.

I find further, that defendant was under instructions from the attorneys for the plaintiff in the execution, to surrender the property when he had got a bond which was sufficient, and that he acted upon such instruction, and voluntarily surrendered the property to the sheriff when the writ was served upon him. The defendant was not in the store, nor was any one there in his behalf when the writ was served, and he did not thereafter appear. That he told the sheriff where the goods were which he had levied upon, and these goods were taken under the writ. That no demand was made upon defendant by said sheriff for the goods prior to the execution of the writ.

I further find, that on the 18th day of November, 1874, the defendant unlawfully took and detained the goods and chattles

59 described in the writ of replevin. Upon the foregoing facts I hold as matter of law, that the plaintiff in this cause is entitled to a judgment for six cents damages and costs of suit to be taxed. Let judgment be entered accordingly.

"I further find that all the testimony in this cause had on the trial before me, was either written records or oral testimony taken stenographically. That the whole of such testimony is herewith returned as part of my findings, and is in words and figures, to wit:"

State of Michigan, the Circuit Court for the County of Kent.

SARAH HEYMAN *vs.* LEONARD COVELL.

GRAND RAPIDS, *October* 23*rd*, 1877.

ADOLPH HEYMAN sworn for the plaintiff, examined by Mr. Norris:

Q. You reside in this city, Mr. Heyman?
A. I do.
Q. You are the husband of the plaintiff in this case?
A. I am.
Q. When did you come to Grand Rapids with your wife?
60 A. I came here in May, 1874.
Q. Previous to that had you been engaged in business in Illinois?
A. I had.
Q. At what place?
A. Quincy, Illinois.
Q. How long were you in business there?
A. Six years.
Q. Between what years?
A. 1868 and 1874.
Q. What was your business there?
A. Dry goods and fancy goods.
Q. While you were in business at Quincy did you fail in business?
A. I did.
Q. Did you make an assignment?
A. I did.
Q. Who was the assignee?
A. Max Rau.
Q. What was his business in Quincy?
A. He was in the merchant tailoring business.
Q. Did he take possession of your stock of goods under your assignment?
A. He did.
61 Q. How long did he remain in possession of that stock of goods?
A. I believe in the neighborhood of about four months.
Q. What did he do with that stock of goods as assignee?
A. He first had sold out of it at retail for a time, and then I understood him to say that it does not pay the expenses. (Objected to.)
Q. What did he do with the stock?
A. Then he put an advertisement in the paper "that the stock is for sale, and if it is not sold to a certain time it will be sold at public auction," and that he sold the stock to Leopold Wiseman.
Q. Who was Leopold Wiseman?
A. A brother of my wife.
Q. What did Leopold Wiseman pay for that stock of goods?
A. Two thousand dollars.

Q. What did Leopold Wiseman do with that stock of goods after he had purchased it of the assignee?

A. He gave them over to my wife.

Q. Made a present of them to her?

A. Yes, sir.

Q. What did she do with them?

62 A. Well, she carried on business with it; she took it and moved it here, and bought some more goods, and carried on the business.

Q. When did she take them first from Quincy?

A. First from Quincy they intended to go to Des Moines, Iowa, and a part of the goods was already there, and they could not find any store to suit; and then she thought, as being here acquainted, as she had been here before, and we being as well acquainted here as anywhere else, she moved here.

Q. She moved here and opened a store here?

A. At 88 Monroe street, I believe, in Bliss block.

Q. Did she subsequently make any purchase or addition to the stock she brought from Quincy?

A. She did.

Q. Was the business carried on openly in her name?

A. Openly in her name, every transaction.

Q. Was her name over the door?

A. Yes, sir.

Q. What was it—the full name?

A. S. Heyman.

Q. What became of that stock of goods?

A. That was at 88 Monroe street?

63 Q. Yes, sir; did the defendant come there and take them?

A. They did.

Q. You may state in detail what the defendant did in and about these goods?

Mr. Covell came to the store and called me; he said, Mr. Heyman, I got a very unpleasant duty to perform; Mr. Covell knew me for some years, and I suppose that is the reason he spoke so; he said he had an execution against me, and I told Mr. Covell that there is nothing here what he can take from me; he then remarked that he thought it would be the best thing to give up the key to him, so that he could take possession and take care of the stock; I answered him that I have no right to give up the key, but will take advice from my wife what to do; and I came to Messrs. Norris, Blair & Stone, and Mr. Blair came up with me to the store; do you want me to state——

Q. State what transpired?

Then Mr. Blair said, Mr. Covell, that it is no use.

(Objected to what Mr. Blair said.)

Mr. Norris. It is information given by the defendant to

64 these parties, and a part of the *res gestas*.

The COURT. I suppose that they have to show that Mr. Covell took their goods without their consent, or without the consent of the plaintiff, and what talk was had between the parties at the time would bear on the question.

A. Mr. Blair told Mr. Covell that the goods belonged to Mrs. Heyman, and if he still insisted to levy on them it would be of no use to take the goods out; that Mrs. Heyman would replevin them immediately. And Mr. Covell was then in the store and staid there. I believe it was in the forenoon; he staid until the afternoon—until the papers were all made out and ready for replevin—and they took this gentleman here, I forgot his name.

Q. Follet?

And Mr. Patten, they took down an inventory of the amount to a certain amount, and then they stopped.

Q. And then Covell vacated the premises?

A. Vacated the premises.

Court question. Did you say that Covell locked the store up in the meantime?

A. No, sir; the store was open as usual.

65 Q. The store was at no time closed?

A. At no time closed. Customers came in and was going out the same as usual.

Q. Did your sales continue that day as usual?

A. We sold, yes, sir; whoever wanted to buy anything.

Q. Was the store at any time left alone in possession of Covell?

A. No, sir.

Q. Always some one there representing Mrs. Heyman?

A. Yes, sir.

Mr. NORRIS. I suppose there is no dispute but what the inventory properly describes the property.

Mr. BUTTERFIELD. I will ask Mr. Covell about that, and I think there is no question. I think the inventory on the writ of replevin was taken from the inventory attached to the execution.

The COURT. No question to the identity?

Mr. BUTTERFIELD. I think not.

Q. I will ask this witness if Mr. Covell, at any time previous to the writ of replevin being served upon him in this case, took

66 any inventory of the stock in the store?

A. He has not.

Cross-examination by Mr. BUTTERFIELD:

Q. So you know the firm of Cochran, McLean & Co., of New York?

A. Yes, sir.

Q. Prior to the time of this assignment, what dealings did you have, if any, with Cochran, McLean & Co.?

Mr. NORRIS. Wait one moment.

Mr. BUTTERFIELD. I propose to show the character of this stock of goods and all about it. I am asking about that assignment, and I propose to go into it.

Mr. NORRIS. Well, I don't know as I have any objections.

Q. Purchasing goods?
A. Yes, sir.
Q. They have a wholesale house in New York?
A. Yes, sir.
Q. When did you say the assignment was made?
A. In January.
Q. What year?
A. 1874.
67 Q. January, 1874?
A. Yes, sir.
Q. When did you go to Iowa?
A. To look for a store?
Q. Yes, sir.
A. In the same year.
Q. What month?
A. Well, it must have been some where in March or April, some where about that time.
Q. Whether or not any of the goods purchased of Cochran, McLean & Co. constituted any portion of that stock at the time it was repurchased from the assignee?
A. I could not swear to that whether it was or not.
Q. How long prior to the time of the assignment was the goods which you last purchased, and for which the judgment in the United States court was rendered, purchased from Cochran, McLean & Co.?
A. About four months.
Q. What was the amount of debts at the time you made that assignment?
A. To them?
Q. To all your creditors?
68 A. About seventeen thousand dollars.
Q. What was the amount of your stock at the time you made your assignment?
A. Well, I declare I do not remember, sir; I could not tell you.
Q. Your best judgment?
A. I don't know; I think it was four or five thousand dollars, or between that.
Q. You are sure it was not more than $5,000.
A. I will not be positive; I have no account of it to correct me now at all.
Q. Had you at that time?
A. I was there when it was taken, of course—when the stock was taken.
Q. How long was it after making that assignment before the assignee took possession of the stock?

A. He took possession of the stock right away.
You say he was in possession four or five months?
A. Yes, sir.
Q. Was it the early or latter part of January that the assignment was made?
A. That I could not swear to, because I have not got it down?
Q. What is your best recollection?
A. I think it was the fore part.
69 Q. When did you say that the present was made of that stock of goods to your wife?
A. After the purchase.
Q. How long?
A. A very short time after, sir.
Q. When was it purchased?
A. It was purchased in April, I believe.
Q. It was after you had moved to Iowa, wasn't it?
A. No, sir.
Q. Before that time?
A. Yes, sir.
Q. It was after you had been to Iowa to look for a place to start in business?
A. I don't know that I understand you.
Q. You stated that you went to Iowa in March, didn't you?
A. March or April.
Q. Did you take the stock with you at that time?
A. No, sir.
Q. When did you take the stock to Iowa?
A. I took the stock; there was a store there which was engaged, in case I could get no better one; I had the promise of a better store, and in the meantime that the goods were there, I got notice
70 that store which I chose I could not get, and friends of mine advised me not to take the other.
Q. What has that to do with that time you took your stock there?
A. Well, I didn't take the stock there until it was purchased by my wife's brother.
Q. How long afterwards?
A. I could not tell you that exactly, I have not took any notice; I have no reason for it to do so.
Q. How long did you remain in Iowa?
A. I did not remain long; a few days.
Q. At the time of assignment what, if any, property other than the stock in trade passed to the assignees?
A. Not any as I know of.
Q. What became of the ——, do you know the price that stock was sold for there?
A. Know what the assignee sold it for?
Q. Yes, sir
A. Yes, sir.
Q. What was it?

A. $2,000.
Q. Who furnished the money to pay for them?
A. My wife's brother.
Q. You didn't furnish any of it?
A. No, sir.
Q. She didn't furnish any of it?
71 A. No, sir.
Q. At the time that Mr. Covell came into the store and apologized to you for having to levy on your property, do you mean to say that he levied upon the whole stock?
A. I don't know what he wanted to levy on, he wanted to levy on it for an execution he had against me.
Q. Did you see the execution?
A. I supposed he showed it to me.
Q. Did you know what court it was issued out of?
A. I didn't take notice what court it was taken out of.
Q. You don't know whether he levied on the whole stock or a part of it?
A. He didn't levy on any part that I know of. He said he had got an execution of such an amount.
Q. He staid there all the time?
A. Yes, sir.
Q. Was there certain goods picked out by him?
A. No, sir; until Mr. Parkman & Mr. Patton from Spring & Avery's came up.
Q. Mr. Patton made the appraisement?
A. Yes, sir.
Q. Was that before or after the writ of replevin?
72 A. That was just at the time it was replevied for my wife.
Q. How long had you been doing business here at the time that execution was levied?
A. I commenced business, I believe, the 28th of May, and that was levied on about in November sometime.
Q. During all this time what, if any business, had you there? What were you doing?
A. I was acting as her agent.
Q. You had the whole charge of the business?
A. For her.
Q. You sold goods, and took the money, and bought goods?
A. I took in the money, bought it for her, and sold it for her.
Plaintiff rests.

The defense.

Mr. BUTTERFIELD. I understand my brother to admit that James Henry was the marshal for the western district of Michigan, and Leonard Covell was his deputy.
Mr. NORRIS. Yes, we have no objection to that.
The COURT. What was the date of this seizure?

Mr. NORRIS. The 15th day of November, 1874.

73 (By agreement of council in open court the files and records in the case heretofore referred to, were considered in evidence.)

LEONARD COVELL sworn and examined in his own behalf.

Examined by Mr. BUTTERFIELD:

Mr. NORRIS. We desire to interpose an objection. I suppose this witness is sworn for the purpose of proving the matters set up in the notice in the plea; is that a fact?

Mr. BUTTERFIELD. That is the fact.

Mr. NORRIS. That being conceded, then we desire to spread an objection upon the record that it is not competent evidence, on the ground that the points set up in the defense in the notice have been adjudicated upon the law side of this court and upon the law issue; and upon the further ground that they are not sufficiently well plead in this, that the notice does not specify that this property which was levied on, was the property of Adolph Heyman.

The COURT. I think you had better take the testimony subject to the objection, and then argue the whole matter, in the meantime the objection will be overruled, and you can note the exception now.

74 Q. What was your business on the 9th day of November, 1874?

I was acting as deputy U. S. marshal for the western district of Michigan.

Q. Deputy of James Henry, who was then U. S. marshal?

A. Yes, sir.

Q. State whether at or about what time you received that execution [in] your hands. (Showing witness a paper.)

A. Yes, sir.

Q. State what you did with it.

A. I made a levy on the stock of dry goods from Adolph Heyman.

Q. When was that levy made?

A. On the 18th day of November, 1874.

Q. Now will you state what you did in the course of the levy?

A. I went into the store and told Mr. Heyman that I had an execution against him, and I was instructed to levy on that stock of goods or property to collect the amount of that execution, and I thought, as a matter of safety, I had better have the goods invoiced and appraised so as to know when I had got sufficient amount.

75 I did not levy on the whole entire stock, and I called in one or two persons, Mr. Patton for one, and handed down the goods, and they were appraised until I got an amount that I thought to be sufficient to satisfy the execution, and about that time the goods were replevied from me, and I surrendered them.

Q. They were taken from you on a writ of replevin?

A. Yes; on a writ of replevin by Mr. Parkman.

Q. Who was the officer that took them?

A. Randall S. Parkman.

Q. At that time, what information had he as to the character in which you hold these goods?

A. He knew I took them as deputy marshal, and he questioned very much the legality or propriety of his taking it in the circuit court.

Q. Did you tell him of the nature of your claim then?

A. Why yes, we talked it over between us.

Q. Is that the exhibit attached, the inventory of the property, upon which you levied? (Showing witness a paper.)

A. Yes, sir.

(It was here agreed by respective counsel in open court that the property received on the execution, and the property re-
76 plevied is identical.)

Q. You never left the store until the goods were taken from you by the process?

A. Never left the store, only for a few moments at a time, and then I had somebody to take my place.

Q. You were in possession of the goods?

Q. I so regarded it; I supposed I was.

Q. You signed that return?

A. I did; yes, sir.

Cross-examined by Mr. NORRIS:

Q. What time of day was it, Mr. Covell, that you went there?

A. My recollection is that I went in the forepart of the day, in the early part, soon after breakfast.

Q. Early in the morning?

A. That is my recollection of it.

Q. Who was there at the time you went in?

A. Mr. Heyman and a young man—his son, I think.

Q. After notifying him that you came there to levy an execution on the stock of goods, did you ask them for the key?

77 A. Well, I have no recollection of asking him directly for the key; I suggested to him that if he would give me the key it would perhaps save confusion of people coming out and in, and afterwards we concluded it would not require the whole stock, and I should take such goods.

Q. I ask you if you remember of asking him for the key and his refusing to give it to you.

A. I tell you I don't recollect distinctly about that.

Q. You did not, at any rate, obtain exclusive possession of the store or the stock, did you?

A. I don't think I had the key.

Q. During the entire time you was there, some one was there representing the store, was they not, representing the owner or the plaintiff?

A. Well, they were out and in.

Q. Making sales as usual, as far as you know?

A. Well, such sales as I pointed off on the shelves, that I would invoice out to a certain point what goods there were, and then if that did not cover it, I would go on beyond, but anywhere else went on with their sales.

Q. How long were you in possession before Mr. Parkman came there?

78 A. I think Mr. Parkman did not come until evening.

Q. Until evening?

A. I don't recollect positive about that; I know I had got through invoicing pretty much, or nearly through.

Q. Are you quite sure of that—that you had got through invoicing?

A. I did not say that; I say nearly through.

Q. Had you begun?

A. Why yes; had been to work at it a long time.

Q. Who appraised it?

A. My recollection is, one was Mr. Patton, and the other one I don't recollect now.

Q. Did you call in Mr. Patton?

A. Yes; I called in whoever appraised them.

Q. Did you call in Mr. Patton?

A. Because he was accustomed to handle goods at that time.

Q. Will you answer my question? Did you call in Mr. Patton?

A. My impression is that Mr. Patton was the man I have had so many cases.

Q. Can't you answer the question, whether you did or did not or don't recollect?

79 A. I tell you that it is my impression that I did.

Q. About what time of day?

A. Shortly after I served the execution or delivered the execution.

Q. Well, that is very indefinite, befor dinner or after dinner?

A. I think it was before dinner.

Q. Where did you find him?

A. I don't recollect.

Q. Do you remember of speaking to him out on the street, or going for him in any way?

A. I think I went for him at Mr. Spring's store, I know I have been there for him and others.

Q. Is it not a matter of fact that Mr. Blair brought Mr. Patton there from Spring's store after he had been down and informed you that the stock would be replevied?

A. It seems possible that might be the case; I don't recollect distinctly about it.

Q. After you had come in there and served this levy, how long was it before Mr. Blair came there on the part of Mrs. Heyman?

A. I think Mr. Heyman sent his boy for Mr. Blair.

Q. Immediately?

80 A. I think it was very soon.

Q. Mr. Blair then came there and informed you that the property belonged to Mrs. Heyman, and would be immediately replevied?

A. I don't recollect that Mr. Blair said so.

Q. You don't remember what he said?

A. No, sir.

Q. He came there helping Mrs. Heyman?

A. Yes, sir.

Q. He came there on some kind of business?

A. He sent for him.

Q. He came there on some kind of business. How do you know what that business was that he came there for?

A. Well, I don't know that I do.

Q. He had the interview with you immediately after you served that levy?

A. We had a general talk then.

Q. But you don't know what passed at that interwiew; do you or don't you know?

A. I may know, but I don't recollect.

Q. If you don't recollect you don't know. You don't remember what did transpire?

A. I don't.

81 Q. At the time that Mr. Blair was there had you taken down a single package of goods off the shelf?

A. I don't remember whether I had or not at that time.

Q. What is your best recollection when you first handled these pieces of goods?

A. My recollection is when I got at the goods, but I could not tell within a minute or two hours.

Q. Did you get the appraisers together yourself?

A. I think I did, we usually do.

Q. Are you willing to swear to it?

A. I am willing to swear that I think I did.

Q. Is it not a fact that after Mr. Blair came there and notified you that this stock belonged to Mrs. Heyman, and would be replevied immediately, that you remained there simply in custody, without taking any inventory, or asserted any ownership, until the writ of replevin was served by Mr. Parkman, and then the two appraisers were called in, and the two appraisals made together?

A. No, sir; it is not.

Q. Who assisted you in making that inventory; who were the appraisers?

A. My recollection is that Mr. Patton was one, and the other one I don't recollect.

82 Q. You don't know who the other one was?

A. No, sir.

Q. Do you know whether you called in the other one?

A. I think I did.

Q. Although you don't know who he was, you think you called him in?

A. I don't know but Mr. Kingsley was one. I know that he was there, or some clerk from the office was there and done the writing.

Q. Do you remember of seeing this young gentleman there, (Mr. Follet)?

A. My impression is that he was. He was in some case, I think, and I think this is the case.

Q. Was there more than one appraiser?

A. Two when they handled the goods.

Q. Who was the other?

A. My recollection is Mr. Patton.

Q. Who was the other one besides Mr. Patton; we have got Mr. Patton?

A. I had half a dozen cases about that time, and my memory don't separate them exactly.

Q. At the time Mr. Blair came there and notified you that they were to be replevied by Mrs. Heyman, did you tell him you should resist that replevin?

83 A. No, sir.

Q. At the time that Mr. Parkman came there to serve the writ of replevin on you did you resist it then?

A. No, sir.

Q. Did you assert your title under the U. S. court execution as superior to Mr. Parkman?

A. Not at all; we talked it over.

Q. You talked it over and then you voluntarily surrendered the stock to him; was there any talk about his furnishing a good bond?

A. Yes, sir.

Q. Then it was because of this good bond, which Mr. Parkman said he should take in the case, that you surrendered it to him?

A. I was under instructions from the attorneys.

Q. Did they instruct you to surrender it?

A. Yes, when I got the bond, which was sufficient, they were satisfied.

Q. Having got a sufficient bond you followed the instsuctions of the attorneys and surrendered it, whatever levy you did make?

A. I levied on the articles named in that invoice.

Re-direct examination:

84 Q. State whether or not any demand was made upon you of these goods before the replevin was issued?

A. I think not, to the best of my recollection.

Q. When you mean you surrendered up these goods, state whether or not, voluntarily, they were surrendered until the writ of replevin was served on you?

A. When the papers were served on me I then gave up and went out.

Q. What do you mean by the term voluntarily; did you offer to give them up?

A. I did.

Q. Or did they take them by virtue of the papers?

A. They took them by virtue of the papers.

Q. When you say you give them up voluntarily you mean you did not resist the officers in the service of the writ?

A. That is just what I mean; I delivered just what I thought I was obliged to do.

Q. At that time you had already told the officer that you claimed these under the process of the United States court, and would not give them up unless they were replevied?

85 A. Mr. Parkman and I, I think, sat down and read over the execution, and I told him about the bonds—that I had some little trouble about getting bonds.

Q. And you refused to give it up until it was replevied?

A. Yes; I don't think there was any demand made on me until it was replevied.

Q. Then the only voluntary giving up was the delivery to the officer on the replevin papers?

A. Yes, sir.

S. D. JACKSON sworn and examined on the part of the defence:

Q. Your name is Samuel D. Jackson?

A. Yes, sir.

Q. You are twenty-one years old and upwards?

A. Yes, sir.

Q. You reside in the city of Grand Rapids?

A. Yes, sir.

Q. And are a merchant by business?

A. Yes, sir.

Q. Where were you on the 9th of July, 1874?

A. In Grand Rapids.

Q. Are you acquainted with James McLean and H. J. Stotzbury, surviving members of the firm of Cochran, McLean & Co.?

86 A. Yes, sir.

Q. Where, on the 9th of July, did they reside?

A. I suppose they reside in New York city; they have for years.

Q. They were citizens of the State of New York at that time?

A. Yes, sir.

Q. Where did the firm of Cochran, McLean & Co. do business?

A. On Broadway.

Q. New York city?

A. Yes, sir.

Q. Whether at any time they have been residents of the State of Michigan to your knowledge?

A. I don't know of any; I never knew of their residing in Michigan.

No cross-examination.

Mr. BUTTERFIELD. I now offer in evidence the files and records, including the execution and return and the entry of judgment in the case of James McLean & Henry H. Stotzbury, surviving partners of the firm of Cochran, McLean & Co., against Adolph Heyman.

(Record received in evidence.)

Defense rests.

87 *The Rebuttal.*

RANDALL S. PARKMAN. sworn and examined on the part of the plaintiff.

Examined by Mr. NORRIS:

Q. On the 18th day of November, 1874, were you a deputy sheriff for the county of Kent?

A. Yes, sir.

Q. On that day did you serve a writ of replevin on Leonard Covell, in possession of a stock of goods, on Monroe street, in this city?

A. I did.

Q. About what time in the day did you make your appearance in the store?

A. My impression is that it was just at night.

Q. Along five or six o'clock in the evening?

A. I should say it was; well I don't think it was quite so late as that; it was before candle light.

Q. Did you find [when] you went there any of the goods in the store taken down from the shelves, or were they back in their usual condition?

A. Those that Mr. Covell had taken were on the west counter, at the south end a pile laid there?

Q. How large a pile; what amount?

A. Well, the invoice shows.

88 Q. When you went there and served your writ did he make any objections to surrendering them to you under the writ?

A. No, sir.

Q. Who did you call in as appraisers?

A. Hudson Patton was one, the other man I don't now recollect his name.

Q. That is the return. If you wish to refresh your memory, was it Mr. Olisen?

A. Yes, Martin Olisen.

Q. Did you proceed then to take an account of the stock and replevin, with these appraisers?

A. Yes, sir.

Q. Who else assisted?

A. Not anybody.

Q. Wasn't there somebody from Mr. Blair's office?

A. Oh, I think Mr. Follet was there.

Q. Now, while you were taking an appraisal of the stock that you replevied, did not Mr. Covell participate in that appraisal and make an inventory at the same time you made an inventory?

A. Mr. Covell was not in the store at all.

Q. Was there anybody in the store for him?

89 A. No, sir; nobody but my two appraisers and Mr. Follet.

Q. Had he surrendered the possession and gone away?

A. The store was open when I went there.

Q. And people were in there all the time?

A. Mr. Heyman was in there when I went there.

Q. Did you go out and bring in Mr. Patten and Olison yourself?

A. Yes.

Q. Mr. Covell had nothing to do with Patten and Olison, to your knowledge?

A. Not to my knowledge.

Q. You were in the exclusive possession of the store after you took it; Mr. Covell went out and you had Messrs. Olisen and Patten there to appraise it and Mr. Follet to assist you?

A. Yes, sir.

Q. Did you go through with the stock?

A. Only what laid there on the counter. I will say right here, I saw Mr. Covel' on the street and told him what I had.

Q. Outside of the store?

A. Outside of the store; he said he had levied on some goods by virtue of an execution, and I told him I had a writ of re-

90 plevin to replevin them. And he said you will find all I took on the counter; they are heavy goods and I found them as he said.

Q. How far was he from the store when he gave you this fnformation?

A. I think we were down to the marshal's office, or pretty near there; I think we were in the marshal's office.

Q. When you went there you found a pile of goods piled upon the counter; was there anybody there representing the marshal at that time, or were they in the custody of the people in the store?

A. There was nobody there but Mr. Heyman and his boys, and I took Mr. Patten and the other gentlemen, and they went in there right off and appraised them, and they gave me a bond in a few minutes, and it was all fixed right off.

Q. This is the appraisal which you have identified?

A. Yes, sir.

Mr. NORRIS. We will put these files in the replevin case in.

Cross-examination by Mr. BUTTERFIELD:

91 Q. You knew at that time by what right Mr. Covell held those goods, did you not?

A. He told me.
Q. What was it?
A. An execution.
Q. From the United States court?
A. Yes.
Q. They were not delivered to you except as you took them on the writ of replevin; you took this case on a writ of replevin?
A. I took them on a writ of replevin.

Testimony closed.

United States of America, the Circuit Court of the United States and Western District of Michigan, of the May Term, A. D. 1874.

WESTERN DISTRICT OF MICHIGAN, *ss:*

James McLean and Henry H. Stotesbury, surviving partners of the firm of Cochran, McLean and Co., which was composed of James McLean, Henry H. Stotesbury, and Fergus Cochran, deceased, who are citizens of the State of New York, by Champlin, Butterfield & Fitzgerald, their attorneys, filing this their declaration as commencement of suit, complain of Adolph Heyman, who is a
92 citizen of the State of Michigan, of a plea of trespass on the case upon promises. For that, whereas, the said defendant in the lifetime of one Fergus Cochran, since deceased, to wit, on the 10th day of September, A. D. 1873, at Quincy, in the State of Illinois, to wit, at the western district of Michigan, aforesaid, made his promissory note in writing, under the name and signature of A. Heyman, and delivered the same to the plaintiffs and the said Fergus Cochran, since deceased, under the name of Cochran, McLean & Co., and thereby promised to pay to the plaintiffs and the said Fergus Cochran sixteen hundred and forty-two and 57-100 dollars, at H. F. J. Rickee's bank, Quincy, Illinois, with current rate of exchange, four months from the date thereof.

And the said plaintiffs aver that afterwards, when the said note became due and payable, according to the tenor and effect thereof, to wit, on the 13th day of January, A. D. 1874, at H. F. J. Rickee's bank of Quincy, Illinois, to wit, at the western district of Michigan aforesaid, the said promissory note was duly presented and shown for payment thereof, and the said sum of money therein specified was then and there duly demanded; yet the said defendant,
93 nor any person on behalf of the said defendant, did or would, at the time when the said promissory note was so presented and shown for payment thereof, or at any other time, before or afterwards, pay the said sum of money therein specified, or any part thereof, but wholly neglected and refused so to do, of all of which several promises said defendant had notice, to wit, on the day and year aforesaid, and at the place aforesaid.

By means whereof, and by force of the statute in such case made

and provided, the said defendant became liable to pay to the plaintiffs and the said Fergus Cochran, since deceased, the sum of money specified in said promissory note when he should be requested so to do, and being so liable, he, the said defendant, did afterwards, to wit, on the day and year last aforesaid, well and truly promise to pay to the said plaintiffs and said Fergus Cochran the said sum of money in said promissory note specified. Yet the said defendant has disregarded his said promise, and has not, though often requested so to do, paid any of the said sum of money, or any part thereof, to the plaintiffs or the said Fergus Cochran, or either of them,
94 in the lifetime of said Fergus Cochran, to the plaintiffs, since the death of the said Fergus Cochran, to the damage of said plaintiffs, five thousand dollars.

And, whereas, the defendants, on the 15th day of November, A. D. 1873, at the State of Illinois, to wit, at the western district of Michigan aforesaid, was indebted to the said plaintiffs and the said Fergus Cochran in the sum of five thousand dollars, for the price and value of goods by the said plaintiffs and the said Fergus Cochran before that time sold and delivered to the said defendant, and at his special instance and request. And in a like sum for the price and value of work and labor by the said plaintiffs and the said Fergus Cochran before that time done, performed, and bestowed for the said defendant, and at his special instance and request. And in a like sum for money before that time lent by the said plaintiffs and said Fergus Cochran to the said defendant, at his special instance and request. And in a like sum for money before that time paid by the plaintiffs and said Fergus Cochran for the defendant, at his special instance and request. And in a like sum for money before that time received by the defendant for the use of the plain-
95 tiff and the said Fergus Cochran. And in a like sum for money before that time found to be due from the defendant to the plaintiff and the said Fergus Cochran on an account stated between them. And being so indebted, he, the said defendant, in consideration thereof, afterwards and in the lifetime of the said Fergus Cochran, to wit, on the day and year aforesaid, at the place aforesaid, undertook and faithfully promised the plaintiffs and the said Fergus Cochran to pay them the said several last-mentioned moneys, respectively, on request; yet the said defendant has disregarded his said promises and undertakings, and hath not as yet paid any of the said moneys, or any part thereof, to the said plaintiffs and said Fergus Cochran, or either of them, in the lifetime of the said Fergus Cochran, or to the said plaintiffs since the death of the said Fergus Cochran, although often requested so to do. But he to do this hath hitherto wholly refused, and still doth refuse, to the damage of the said plaintiffs of five thousand dollars, and therefore they bring suit, etc.

CHAMPLIN, BUTTERFIELD & FITZGERALD,
Attorneys for Plaintiffs.

6–255

96 To the above-named defendant:

Take notice that on the trial of the above cause the plaintiffs under the money counts will give in evidence a certain promissory note, a copy of which is given below.

CHAMPLIN, BUTTERFIELD & FITZGERALD,
Attorneys for Plaintiffs.

[Copy.]

UNITED STATES OF AMERICA, *Western District of Michigan,* } *ss:*

I hereby certify that on the thirteenth day of July, A. D. 1874, I served on Adolph Heyman, the within named defendant, by delivering to him a true copy of the within "Narr," in Grand Rapids, in said district, together with a copy of the notice to plead, endorsed thereon as is hereon endorsed.

JAMES HENRY, *U. S. Marshal.*
By HORACE TOMPKINS, *Deputy.*

($1,642 57-100.) QUINCY, ILLINOIS, *Sept.* 10. 1873.

Four months after date I promise to pay to the order of Cochran, McLean & Co. sixteen hundred forty-two and 57-100 dollars, at H. F. J. Rickeer's bank, Quincy, Illinois. Valued received, with
97 current rate of exchange.

A. HEYMAN.

"Quincy, Illinois." Protested for non-payment before me, this tenth day of January, A. D. 1874.

RICHARD JANSEN, *Notary Public.*

United States Circuit Court, Western District of Michigan.

JAMES MCLEAN *et al.* *vs.* ADOLPH HEYMAN. } "Narr."

To the within named defendants:

Take notice, that on filing a declaration in this cause (of which the within is a true copy) as commencement of suit a rule was entered in the book of Common Rules, kept by the clerk of said court, in his office in the city of Grand Rapids, requiring you to appear and plead to said declaration within twenty days after service on you of a copy thereof, and notice of said rule or judgment, etc.

CHAMPLIN, BUTTERFIELD & FITZGERALD,
Plaintiffs' Attorney.

Filed July 9th, 1874.

ISAAC H. PARISH, *Clerk.*

A. D., 185.

98 May Term, A. D. 1874, July 9th.

JAMES M. McLEAN and HENRY STOTESBURG
vs.
ADOLPH HEYMAN. } 629.

In this cause, on filing declaration as commencement of suit, and on motion of Champlin, Butterfield & Fitzgerald, attorneys for plaintiffs, ordered that said defendant appear and plea to said declaration within twenty days after service on him of a copy thereof with notice of this rule or judgment, etc.

CHAMPLIN, BUTTERFIELD & FITZGERALD,
Plaintiffs' Attorneys.

Circuit Court of the United States for the Western District of Michigan.

JAMES McLEAN and HENRY H. STOTESBURG, surviving partners of the firm of Cochran, McLean & Co.,
vs.
ADOLPH HEYMAN.

And now comes the said defendant, by Norris, Blair & Kingsley, his attorneys, and demands a trial of the matter set forth in
99 the plaintiffs' declaration.

NORRIS, BLAIR & KINGSLEY,
Attorneys for Defendant.

Circuit Court of the United States for the Western District of Michigan.

JAMES McLEAN *et al. vs.* ADOLPH HEYMAN.

Plea filed July 29, 1874. Isaac H. Parrish, clerk. Norris, Blair & Kingsley, defendant's attorneys.

October term, A. D. 1874.

This cause having been duly called to trial, parties, by their respective attorneys, appeared, whereupon defendant's attorneys withdrew his plea, and the following jury was called and sworn, to wit: Isaac M. Keeler, Fritz L. Reed, Joseph Musgrove, Arthur C. Prince, Hoser Burch, N. Tillson, William H. Hurlburt, Edwin T. Avery, Allen S. Adzit, James H. Tibbetts, Asa Spencer, Horatio Hall, who, having sat together and heard the evidence and charge of the court, say, upon their oaths, that the defendant did undertake and promise in manner and form as alleged in the declaration, and
100 they assess the damages of the said plaintiffs at the sum of $2,089.04 over and above his costs. It is thereupon considered by the court that the said platntiffs do recover against the said defendant the said sum so assessed by the jury as aforesaid, together

with his costs and charges to be taxed, and that he have execution therefor.

Circuit Court of the United States of America, for the Western District of Michigan.

The President of the United States of America, to the Western District of Michigan, Greeting:

[SEAL.] You are hereby commanded that of the goods and chattles and for want thereof, then of the lands and tenements of Adolph Heyman in said district, you cause to be levied and made, the sum of two thousand and eighty-nine dollars and four cts., which James McLean and Henry Stotesburg, surviving parties, etc., lately in the circuit court of the United States for the western district of Michigan, before the judges thereof at the court-house, in the city of Grand Rapids, recovered against him for and on account of the non-performance of certain promises and undertakings, and also the
101 sum of thirty-one dollars and ten cents, which was awarded by said court to the said James H. McLean and Henry H. Stotesburg, for their costs and charges by them about their suit, in that behalf laid out and expended. Whereof the said Adolph Heyman was on the 28th day of October, A. D. 1874, convicted as appears of record; and have you those moneys in said circuit court of the United States for the western district of Michigan, at the court-house, in the city of Grand Rapids, on the 1st Tuesday of February next ensuing, to render to the said James McLean and Henry Stotesburg, for their damages and costs aforesaid, and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 9th day of November, in the year of our Lord A. D. 1874, and of the Independence of the United States the ninety-ninth.

ISAAC PARISH, *Clerk.*

WESTERN DISTRICT OF MICHIGAN, *ss:*

I hereby certify and return that after the coming to me of the within execution which was dated on the 9th day of Novem-
102 ber, 1874, on the 18th day of November, 1874, I levied by virtue thereof in due form of law, upon certain goods and chattles of the within defendant, a correct list of which is hereto annexed, marked "A," but before the sale thereof the same were replevied and taken out of my custody by Randall S. Parkman, a deputy sheriff of the county of Kent, and State of Michigan, at the suit of Sarah Heyman *vs.* Leonard Covell, and I can find no other goods or chattles, lands or tenements, of the within named defendant in my district whereof to make the amount of the within execution or any part thereof.

JAMES HENRY, *U. S. Marshal.*
By LEONARD COVELL, *Deputy.*

Circuit Court of the United States, Western District of Michigan.

JAMES McLEAN ET AL. *vs.* ADOLPH HEYMAN.

Fieri Facias.

Judgment	$2,089 04
Interest from October 28th.	
Costs	31 90
Execution	1 50

Returned and filed October 28th, 1874.

103 ISAAC PARISH, *Clerk.*

CAAMPLIN, BUTTERFIELD & FITZGERALD,
Plaintiff's Attorneys.

Marshal's costs in levying and assisting in handling goods.. $15 00

Received the above amount Nov. 20th.

L. COVELL.

Exhibit A.

1 piano spread	$6 00
3 pieces summer dress goods	7 50
4 pieces West poplin	12 00
1 piece summer dress goods	12 00
1 piece grey flannel	3 50
1 piece apron check	5 00
1 piece check ticking	12 00
2 pieces reps	14 00
12 pieces bleached cotton	60 00
410 yards sheeting (10)	41 00
3 pairs woolen blankets	18 00
158 yards canton flannel	18 00
150 yards Irish linen	93 00
100 yards Gen. cloth	18 00
1½ dozen towels	1 88
44 towels	6 60
104 6 towels	3 00
18 dozen doyles	27 00
2 pieces German cloth	12 00
15 shawls	60 00
5 pieces Kentucky jeans, 160 yds., 30 cts	48 00
100 yards cassimere	85 00
37 yards do.	50 00
76 yards black silk	114 00
32 yards " "	48 00
4 yards satin	6 00
6 yards "	7 50
5 pieces valeur velvet	32 50

6 pieces Japanese silk		65 00
2 pieces valeur velvet		19 00
24 yards Japanese poplin		9 00
1 piece white alpaca		6 00
8 pieces black "		48 00
229 corsets		300 00
6 pieces diaper		3 00
14 pieces Bird jaconette		104 00
4 pieces nainsook, 32 yards		8 00
2 pieces jaconette, 29 yards		7 00
1 piece ticking, 85 yards		2 50
4 pieces Bishop's lawn		14 00
	4 pieces tarlatan, 52 yards	12 00
105	3 pieces Swiss muslin, 40 yards	10 00
	16 pieces Victoria lawn, 181 yards	90 50
3 pieces colored alpaca, 48 yards		5 50
5 pieces merino, 90 yards		70 00
4 pieces empress cloth, 125 yards		62 50
80 pounds zephyr		80 00
2 show cases and contents		200 00
7 pieces ticking		30 00
1 piece apron check		5 00
1 piece m. stripe		4 50
24 shirts		30 00
2 dozen cotton shirts		15 00
6 pieces cambric		24 00
9 pair drawers, 6		6 75
5 pieces shambra		22 00
7 pieces table linen		55 00
4 pieces satin twill		25 00
1 piece huckabuck		10 00
2 pieces linen toweling		6 00
7 pieces crash		20 00
1 piece apron check		15 00
1 piece cottonade		4 00
1 piece cottonade		8 00
1 piece cassimere		12 00
	3 pieces cottonade	7 00
106	1 piece cottonade	5 00
	6 pieces cottonade	40 00
3 pieces nankin		12 00
4 pieces grenadine		35 25
8 pieces grenadine		12 50
20 ladies' wrappers		16 00
10 pair drawers		8 00
8 shirts		4 00
5 colored wrappers		4 00
3 colored wrappers		1 88
3 pieces waterproof		27 50

1 piece beaver		20 00
8 pieces bleached cotton		20 00
11 felt shirts, 1.50		16 50
3 nankay sattain		5 00
1 nankay sattain		3 00
5 pieces linen		50 00
2 small camber pams		1 50
1 piece linen lawn		10 00
4 pieces waterproof		65 00
9 pieces paper cambric		28 80
1 piece wiggings		2 00
1 remnant flannel		2 00
1 piece linsey wolsey		2 00
	11 pieces white flannel	56 25
107	5 pieces assorted opera flannel	25 20
	1 piece blue flannel	9 00
1 piece white corduroy		4 00
4 pieces white flannel		9 00
1 piece grey flannel		4 05
9 pieces red flannel		26 25
2 pieces check flannel		20 00
1 piece check flannel		9 00
3 pieces plaid opera flannel		30 00
2 pieces orange flannel		7 00
3 pieces orange flannel		6 00
3 pieces linsey wolsey		3 00

And thereupon afterwards, to wit, on the 8th day of February, A. D. 1880, came said plaintiff, by her counsel, and filed in accordance with the rules and practice in that behalf provided, her written exceptions to matters of law ruled by the court in his aforesaid finding, which written exceptions are in the words and figures following, to wit:

State of Michigan, the Circuit Court for the County of Kent.

SARAH HEYMAN *vs.* LEONARD COVELL.

108 Now comes the plaintiff, and by Norris & Uhl, her attorneys, under the rules and practice of this court, except to the matters of law in the finding of the court heretofore filed August 4th, 1879, as the same was afterwards amended December 16th, 1879, in this, to wit:

First. To the ruling that upon the pleadings and facts found defendant is entitled to a judgment for a return of the goods mentioned in the writ of replevin.

Second. To the ruling that as matter of law defendant was entitled upon the facts found to a judgment for the return of the property taken under the writ of replevin.

Third. To the ruling that plaintiff is not entitled to judgment for six cents damages and costs against defendant.

Fourth. Because the court neglected and refused to find as matter of law that upon the facts found the plaintiff is entitled to judgment for nominal damages and costs against defendant.

Fifth. Because the court neglected and refused to find as requested by plaintiff in her proposed findings of fact and law submit-
109 ted to said court, a copy of which proposed findings of fact and law is contained in the amended finding.

Sixth. Because the court neglected and refused to embody in its finding all the material facts in the case (as well as the law), said court having been thereto requested in writing before judgment by plaintiff's counsel.

NORRIS & UHL,
Attorneys for Plaintiff.

Dated February 6th, 1880.

And with intent that the said matters of law may be ruled by the supreme court, the court has this day signed and settled the aforesaid bill of exceptions, at the request of said plaintiff.

BIRNEY HOYT,
Circuit Judge.

Dated February 18th, 1880.

Writ of Error.

The People of the State of Michigan to the Judge of our Circuit Court in and for the County of Kent, Greeting:

Because in the record and proceedings, and also in the giv-
110 ing of judgment, and in a plaint which was in our circuit court before you, between Sarah Heyman, plaintiff, and Leonard Covell, defendant, in a plea of assumpsit, manifest error hath intervened, to the great damage of the said plaintiff, as by complaint we are informed, we being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid, and in this behalf do command you, that if judgment be thereupon given, then you send to our justice of our supreme court of jurisdiction, distinctly and openly upon your seal, the record and proceedings of the plaint aforesaid, with all things concerning the same, and this writ, so that they may have them at the court house in the city of Lansing, on the 11th day of March next, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon for correcting that error what of right and according the law and custom of the State of Michigan ought to be done.

Witness the Honorable Isaac Marston, chief justice of our supreme court, at Lansing, this twelfth day of February, in the year of our Lord one thousand eight hundred and eighty.

CLAUDE C. WALKER,
Clerk of the Supreme Court.
ED. W. LOWE, *Deputy Clerk.*

111 State of Michigan, supreme court.

SARAH HEYMAN, Plaintiff in Error,
vs.
LEONARD COVELL, Defendant in Error.

And now comes said plaintiff in error by Norris & Uhl, her attorneys, by way of assigning error on the record and bill of exceptions and says:

I. The court erred in ruling, that upon the pleadings and facts found, defendant (defendant in error) is entitled to a judgment for the return of the goods mentioned in the writ of replevin.

II. The court erred in ruling, that as matter of law, defendant (defendant in error) was entitled, upon the facts found to a judgment for the return of the property taken under the writ of replevin.

III. The court erred in ruling, that plaintiff (plaintiff in error) is not entitled to judgment for six cents damages and costs
112 against defendant, (defendant in error.)

IV. The court erred in neglecting and refusing to find as as matter of law, that upon the facts found, plaintiff (plaintiff in error) is entitled to judgment for nominal damages and costs against defendant, (defendant in error.)

V. The court erred in neglecting and refusing to find as requested by plaintiff (plaintiff in error) in her proposed finding of fact and law submitted to said court, a copy of which proposed finding of fact and law is contained in the amended finding.

VI. The court erred in neglecting and refusing to embody in its finding all the material facts of the case (as well as the law.) Said court having been thereto request in writing before judgment by plaintiff's counsel.

NORRIS & UHL,
Att'ys for Plaintiff in Error.

Dated GRAND RAPIDS, *March* 27, 1880.

113 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the city of Lansing, on the 13th day of October, in the year one thousand eight hundred and eighty.

Present: The Honorable Isaac Marston, chief justice; Benjamin F. Graves, Thomas M. Cooley, James V. Campbell, associate justices.

SARAH HEYMAN, Pl't'ff in Error,
vs.
LEONARD COVELL, Def't in Error.

The record and proceedings in this cause having been removed to this court by a writ of error issued to the circuit court for the county of Kent, and the same and the matters in error assigned

having been seen and inspected and duly considered by the court, and it appearing to this court that the said record and proceedings and in the giving of judgment in said circuit court there is
114 manifest error; therefore it is ordered and adjudged by the court that the judgment of said circuit court for the county of Kent be, and the same is hereby, reversed and vacated. And it is further ordered that the plaintiff in error do recover of and from the defendant in error the sum of six cents damages, together with her costs of both courts to be taxed and have execution therefor.

State of Michigan, in the Supreme Court.

SARAH HEYMAN, Plaintiff in Error,
vs.
LEONARD COVELL, Defendant in Error.

STATE OF MICHIGAN, *ss:*

I, Ed. W. Lowe, deputy clerk of the supreme court of the State of Michigan, at Lansing, do hereby certify that the foregoing is a true and compared copy and transcript of the record in said cause
115 in said court and of the whole thereof; that said cause has been twice before said court on writs of error issued to the circuit court for the county of Kent in said State, and that the foregoing is a true and compared transcript of the record of said cause returned and filed herein under both of said writs of error.

In witness whereof, I have hereunto set my hand and affixed the seal of said supreme court, at Lansing, this twentieth day of November, in the year of our Lord one thousand eight hundred and eighty.

[SEAL.] ED. W. LOWE,
Deputy Clerk Supreme Court, Mich.

"Exhibit B."

HEYMAN *vs.* COVELL.

(Filed Oct. 13, '80.)

CAMPBELL, J. Mrs. Heyman, the plaintiff, sued defendant in replevin for certain goods which, as we understand the finding, the court below held were unlawfully taken from her by the defendant, but nevertheless gave judgment in his favor. Defendant, at
116 the time the goods were replevied, held them as United States deputy marshal, under an execution issued from the circuit court of the United States for the western district of Michigan against one Adolph Heyman, who was plaintiff's husband. There are no legal conclusions set out in the finding, and there are some facts set out which would seem to indicate that there were questions discussed concerning the validity of plaintiff's title. We have had some doubt whether the court below did not err in failing to find more specifically, as requested. But the facts actually found show nothing to controvert it. We shall assume, therefore, what has been as-

sumed by counsel for both parties, that the ground of decision was that defendant's possession, though wrongful, must prevail over State process issued in favor of the real owner. And we shall consider the record as involving the question, whether a United States marshal, by seizing the property of a stranger to the execution in his hands, can cut off the right of the owner to recover his property thus wrongfully seized. For the right is effectually cut off if it cannot be replevied in the State court, when there is no remedy provided by law for trying the title anywhere else. The case
117 supposed to stand in the way of this remedy is Freeman *vs.* Howe, 24 Howe, 450. The language of that case does, when taken by itself, tend to sustain the claim of the defendant, and if it were applicable here and not affected by subsequent decisions, we should be disposed, (as stated in Carew *v.* Matthews, 41 Mich., 576,) to regard it as perhaps disposing of the case. But when this decision is considered in the light of other decision which are recognized as binding in United States courts, we think it has no force when applied to the issue before us. The only ground of the decision was that the property there in controversy was in the custody of the United States court for legal purposes, and that an effectual remedy existed in that court to try and determine the rights of the adverse claimant. If this was so there was little room for discussion. The remedy there suggested was a bill in equity which it was said would not be treated as a separate suit, but only as a collateral proceeding in the same suit. And reference was there made to some other cases in which the question decided was not whether one jurisdiction could interfere with another, but whether the remedy in equity was a proper remedy to protect the particular rights
118 in controversy. In Freeman *v.* Howe there can be little doubt that there was a remedy in equity so far as the subject-matter was concerned, for the complaining parties were railroad mortgagees in trust, and the property replevied by them was taken in that capacity against the levy, not by execution, but under *mesne* process. There was certainly some force in the suggestion was there adequate, and that fact that the property was in the custody of the court was assumed. Possibly that is true in some cases in regard to property held under *mesne* process. But such was not the view concerning property held under final process, and it has been uniformly held that a marshal is a trespasser and in no way protected by his process when he seizes the property of a stranger. In Buck *v.* Colbath, 3 Wall., 334, the action was trespass, and therefore all that was said about other remedies was *obiter*. But it is distinctly intimated that the difficulty did not arise except concerning property actually or constructively in the possession of the court and while litigation was still pending. Property under *mesne* process is in some cases the only basis of jurisdiction, and it is often subject to disposition for various purposes *pendente lite*, so that it may not only be dis-
119 charged from seizure but may sometimes be dealt with otherwise. This creates at least a colorable if not a real distinc-

tion, and may give some force to the claim that it is in the custody of the court, although we are not prepared to say the distinction is usually in fact very important.

The case of Buck *v.* Colbath, is significant in confining the doctrine of conflict to interference with the action of courts, and in holding that a marshal who levies upon the property of a stranger is in no sense acting under process unless the writ directs the seizure of the specific property taken. The distinction between writs against specific property and those against undescribed property of named persons is made the turning point. And it was said emphatically that the plaintiff in error is mistaken when he asserts that the suit in the federal court drew to it the question of title to the property, and that the suit in the State court against the marshal could not withdraw that issue from the former court. No such issue was before it, or was likely to come before it in the usual course of proceedings in such a suit. In the subsequent case of McKee *vs.* Rains,
10 Wall., 22, it was held that a trespass suit by a third per-
120 son against a marshal could not be removed into a court of the United States, because his levy could not be regarded as made under any authority of the United States. This is certainly equivalent to holding that he is no better off than if he had no process, and it is difficult to conceive how it leaves any room for holding that a disturbance of his wrongful possession is an interference with the court. It would not be—we suppose—competent for Congress or any State, even by prior enactment to deprive the owners of property of the right to vindicate their title by a legal process in a judicial trial. There is no legislation which provides any control whereby Mrs. Heyman could secure her rights in the United States court against Covell, unless she has such a remedy in due form of law, her only resort must be to the State courts, and this is recognized in McKee *v.* Ranis, as well as in Slocum *v.* Mabury, 2 Wheat., 2. It was indeed held in Freeman *v.* Howe, that equity would relieve in that particular instance, and was said that it would in any case of wrongful levy, on a third person's goods. If this were so the
case would be difficult of redress. But it has since been held
121 that there is no such remedy. In Van Norden *vs.* Norman, 99 U. S., 378, a bill in equity was filed in the circuit court of the United States for the district of Louisiana, to secure protection and restoration against a marshal's levy under an execution from the same court, and the circuit court made such a decree. But on appeal to the United States Supreme Court it was held that replevin was the proper remedy to regain possession, or some similar proceeding in the nature of a common law replevin, and that equity had no jurisdiction. The decree was reversed for want of jurisdiction without prejudice to an action at law or other redress.

If there is no remedy by bill in equity then it follows that a common law action is the proper redress, and such an action can only be brought in a court of the United States where the parties are such as to confer jurisdiction, and in such cases the statutes have

made the jurisdiction concurrent with power of removal under certain circumstances.

In the present case it does not appear that suit could have been brought any where but in the State court, and the case has gone to judgment in the usual course. We think there was no ground for refusing redress to plaintiff, and that she was entitled to judg-
122 ment on the finding. Judgment must be reversed with costs, and judgment entered for plaintiff with nominal damages of six cents. Marston, C. J., and Graves, J., concurred.

COOLEY, J. My bretheren may be right in their view that the later decisions in the federal supreme court have in effect overruled Buck *v.* Colbath, but I prefer to await an authoritative declaration to that effect by the court itself.

STATE OF MICHIGAN, } *Supreme Court,* } ss:

I, Ed. W. Lowe, deputy clerk of the supreme court of the State of Michigan, do hereby certify that the above and foregoing is a true copy of the record filed in said court in said cause, with a copy of the proceedings had therein, and a copy of the opinion of said court and the judgment entered therein upon the same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, this 12th day of January, A. D. 1881.

[SEAL.] ED. W. LOWE,
Deputy Clerk, Supreme Court.

Endorsed on cover: Michigan supreme court. No. 255. Leonard Covell, Pl'ff in error, *vs.* Sarah Heyman. Filed 13 June, 1881.

11-F 8

UNITED STATES OF AMERICA.

SUPREME COURT.

OCTOBER TERM, 1883.

LEONARD COVELL,
Plaintiff in Error.

vs.

SARAH HEYMAN,
Defendant in Error.

Error to Supreme Court of Michigan.

BRIEF FOR PLAINTIFF IN ERROR.

ROGER W. BUTTERFIELD,
Atty for Plaintiff in Error.

J. W. CHAMPLIN,
Attorney and of Counsel.

UNITED STATES OF AMERICA.

Supreme Court of the United States.

LEONARD COVELL,
Plaintiff in Error,
vs.
SARAH HEYMAN,
Defendant in Error.

October Term, 1883, No. 255.

ASSIGNMENTS OF ERROR.

And now comes the said plaintiff in error, by J. W. Champlin, his attorney, and says that in the record and proceedings in this cause, of the Supreme Court of Michigan there is manifest error in this:

FIRST.

That the said Supreme Court erred in reversing the judgment of the Circuit Court for the County of Kent, and in sustaining the demurrer of defendant in error to the plea in abatement of the plaintiff in error. (R., fo. 44.)

SECOND.

That the said court erred in reversing the judgment of the Circuit Court for the County of Kent, and in rendering judgment for the defendant in error, and the plaintiff in replevin below. (R. fos. 114–116, 122.)

THIRD.

That the said court erred in deciding that the Circuit Court for the County of Kent, being a State Court, had jurisdiction of this cause, being an action of replevin, and involving the possession of property already in the possession of the United States Court when seized by the process of the State Court. (R. fos. 116, 122.)

FOURTH.

That the Supreme Court of the State of Michigan erred in holding that property in the possession of the United States Marshal, by virtue of process issued from a court of the United States can be taken from his possession by a stranger to that process, under process issuing out of a State Court.

FIFTH.

That the Supreme Court of Michigan erred in treating the finding of facts of the Circuit Court for the County of Kent, in this cause as a finding that the possession of the defendant in replevin, and plaintiff in error was wrongful. (R., fo. 117.)

SIXTH.

That the said court erred in finding, as a matter of law, that the plaintiff in replevin below, (defendant in error,) could take by writ in this cause, a writ issued from a State Court, from defendant below, (plaintiff in error,) the property in question in this suit, the same having been taken by said defendant below, and being in his possession, as United States Marshal, by virtue of the process of the United States Court, to which process defendant in error was a stranger. (R., fos. 116, 122.)

And for the errors aforesaid, the said defendant, (plaintiff in error,)

prays that the said judgment of the Supreme Court of Michigan may be set aside, vacated, reversed and held for naught; and that the said judgment of the Circuit Court for the County of Kent may be affirmed, and that judgment may be entered in favor of this defendant and plaintiff in error, for the return of the property seized by the plaintiff on the writ of replevin issued herein.

J. W. CHAMPLIN,
Attorney for Plaintiff in Error.

UNITED STATES OF AMERICA.

Supreme Court of the United States.

LEONARD COVELL.
Plaintiff in Error,
vs.
SARAH HEYMAN.
Defendant in Error.

STATEMENT OF FACTS.

The facts of this case are fully set forth in the findings of the trial judge, (R. p. 22, fo. 51), which, under the Michigan practice, have the effect of a special verdict, and may be briefly stated as follows:

On the 9th day of July, 1874, James McLean and Henry W. Stotesbury, who were then residents and citizens of the State of New York, brought their action as surviving partners of Cochran, McLean & Co., in the Circuit Court of the United States for the Western District of of Michigan against Adolph Heyman, the husband of defendant in error, who was a resident and citizen of the State of Michigan and of said district, for the purchase price of goods sold him by plaintiffs about six

months before, and after an appearance on the part of the defendant, a judgment was rendered against said Adolph Heyman for two thousand eighty-nine and 44 100 dollars, and thirty-one and 10-100 dollars costs of suit. The pleadings and judgment in this cause are in the record, (fos. 92 to 100.) On this judgment a writ of execution in the usual form was issued (fo. 101) out of the said Circuit Court of the United States for the Western District of Michigan, directed to the United States Marshal, directing him to satisfy such judgment and costs, which execution was placed in the hands of Leonard Covell, plaintiff in error, who was then a deputy of James Henry, the United States Marshal for said district; that afterward, and during the life of said writ of execution, plaintiff in error levied on and seized the property described in the declaration, as the property of the defendant named in his writ, Adolph Heyman; that at the time of the seizure he found said Adolph Heyman in charge thereof; that afterwards the property so seized and levied on was taken from his possession by Randall S. Parkman, a deputy sheriff ofthe County of Kent, and State of Michigan, and acting as an officer of the State of Michigan, under the writ of replevin in this case; that at the time of the seizure of said goods Parkman was informed that plaintiff held them by virtue of the execution above referred to as deputy United States Marshal, and as the property of the defendant in that execution.

To the declaration filed by defendant in error in the replevin suit, (R. p. 10,) the plaintiff in error in person pleaded in abatement the fact that he had seized and held the property in question under the execution above mentioned; that the same was regular in form and regularly issued out of the Circuit Court of the United States for the Western District of Michigan; that such seizure had been made in accordance with the direction of the writ. (R. p. 11, fo. 26.)

After the making and filing of this plea through a misunderstanding the default of the defendant below, Covell, was entered (pages 13 and 14 R.,) but was afterward set aside on stipulation (R. p. 14, fo. 33,) and the counsel for Sarah Heyman demurred to the plea in abatement (R. p.

15, fo. 35.) Covell joined in demurrer. (P. 16, fo 36.) On the issue so joined judgment was rendered by the court from which the replevin writ issued for a return of the goods to the marshal, (fo 38). A writ of error, (fo. 40,) was then issued from the Supreme Court. To this errors were assigned (fo. 42,) and on the hearing the judgment was reversed on the grounds set up in the opinion hereinafter set forth in full, (fo. 43,) which judgment constitutes the first error complained of.

On the new trial Covell pleaded the general issue, (fo. 45,) and gave notice in substance of the same defence as that set forth in the plea in abatement, and judgment was again rendered in favor of the Marshal Covell; and the court, in accordance with the request of Heyman found the facts as hereinbefore stated, (fo. 51). For the purpose of raising certain questions on the correctness of these findings counsel for Heyman requested the court to find as requested by them. These findings so proposed by defendant in error and *refused by the court*, are found in the record, (fo 57). They purport to set forth all the testimony in the case on the trial below. The case went to the Supreme Court of the State again, on exceptions to this judgment filed by Heyman. The judgment of the court below was again reversed, and final judgment was rendered against the plaintiff in error, for the reason mentioned in the opinion, (fo 116) And the remainder of the assignments in error refer to this judgment.

FIRST POINT.

We think that the court erred in sustaining the demurrer to the plea in abatement, filed by plaintiff in error, to the declaration filed herein, (fo. 26). As the reason on which the plea was held bad is not one set forth in the demurrer, (fo. 34) and as the opinion of the court stating the reason for its decision is not lengthy, we quote it in full as it appears in 36 Mich., 157, Heyman vs. Covell. It will be found annexed hereto and marked "Exhibit A." It is claimed that no judgment is set up in the plea. The answer of the officer sets up his writ,

which on its face recites the recovery of the judgment on which it is issued, and recites it correctly. The question is, "Is it necessary to make a separate averment of the judgment apart from that contained in the writ?" The only purpose of the inquiry, as to the judgment or order at all, is an inquiry into whether or not the United States Court had properly issued the execution. We contend that this was not for the State Court to determine, and it was something with which the officer had nothing to do. The real point of the defence, set up in the plea of abatement, is that the defendant was in possession of the property under process, regular on its face, issued by the United States Court; that it was, therefore, *in custodia legis*, and that all questions as to the right to that custody affecting the custody itself must be determined by that court. Suppose that a judgment had been averred; would a State Court have the right to enquire into whether or not it was properly or improperly rendered? or, in case of a question bearing on the possession of property seized by virtue of the process of a court, whether or not the court had the right to issue the process?

If the possession of this court by its process was a sufficient answer to an action of replevin for goods so held, the plea was sufficient.

Matthews vs. Densmore, decided by this court Nov. 12, 1883.

SECOND POINT.

We say that the facts of the case are directly within the rule that, whenever property has been seized by an officer of the court, by virtue of its process, property so taken is to be considered as in the custody of that court and under its control, and no other court has a right to interfere with that possession, except it be a court having direct supervisory control over the court under whose process the possession has been taken, or some superior jurisdiction in the premises; that the reason of the rule is the prevention of unseemly contests for the mere possession of persons and property, and the avoidance of dangerous controversies between National and State authorities.

The Circuit Court found the property detained by the Marshal by virtue of the process of the United States Court. It did not determine the question of title. It did not undertake the examination of the right of that detention further It simply held that fact sufficient to prevent the court from endeavoring to interfere with the possession.

We submit that the learned and revered judge, who gave the opinion of the court below, was not justified in saying: "The ground of decision was that defendant's possession, though wrongful, must prevail over State process issued by the real owner." The court expressly refused to find that such holding was unlawful, and that Sarah Heyman was the real owner, and that the property was unlawfully detained; and this refusal was one of the grounds of complaint upon appeal, (fo. 112); and certainly, the judgment on findings should not be treated as though the court had found what it expressly refused to find. These findings in substance are that, the possession of the property in this case being proven to have been in the United States Court, all questions as to the character or right of that possession or affecting it must be determined by the court which had the possession.

The decision of the Circuit Judge at the trial was in strict accordance with the rule we claim. Is the rule a correct one?

Before proceeding to the cases directly involving the main question, a remark may be made as to one or two objections contained in the opinion of the court below.

It is claimed that a distinction exists between property seized under mesne process, and under execution, with reference to the question as to whether or not they are in the custody of the court. We are not able to find any adjudicated cases sustaining this difference. The rule that property levied on and seized by an officer of the court under an execution is in the possession of the court, is laid down in a large number of cases, which will be particularly referred to hereafter, and also in the following:

Jones Stationery and Paper Co. v. Case, 26 Kan., 299.

Jones v. Jones, 1 Bland Chan., (Md.) 443.

Hartwell v. Bissell, 17 Johns, 128.

In the case of Wayman v. Southard, 10 Wheat., 1, this court say: "The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. Many questions may arise on the process subsequent to the judgment, in which jurisdiction is to be exercised It is, therefore, no unreasonable extension of the words of the act to suppose an execution necessary for the exercise of jurisdiction. Were it even true that a jurisdiction could technically be said to terminate with the judgment, an execution would be necessary for the prevention of that which was previously done, and would consequently be necessary to the beneficial exercise of jurisdiction." In the opinion of this court in Riggs v. Johnson, decided in 1867, (16 Wall, 187), this is cited and approved in the following language: "The express determination of this court is, that the jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until that judgment shall be satisfied.

It is further claimed that this is a case where no remedy exists at all unless the plaintiff is permitted to prosecute this suit in the State Court. In most of the states there are methods provided by statute by which the ownership of property levied on can be speedily and summarily determined by a collateral proceeding with principal cause, but ancillary to it, which could be taken as well in the United States as in the State Court, and which, in most of the States would remove the difficulty which is claimed here. But the mere fact that there is wanting in a State, Legislation to furnish a convenient remedy for a party, does not alter the rule of law, if it were a fact. We claim, however, that a sufficient remedy existed for the plaintiff for any wrong which she might have suffered, in strict accordance with the rules of this court and its practice as heretofore established.

In the case of Dunn v. Clark, 8 Peters, 2, decided by this court in 1834,

a judgment had been rendered in Ohio in ejectment in favor of a citizen of Virginia, who died. Citizens of the State came into the Circuit Court and filed a bill against another citizen of the same State, of Ohio, asking the court to enjoin the issuing of execution on the judgment in ejectment The court held that the suit was not original but merely collateral to the original suit in which the court had jurisdiction, and that for the purpose of controlling the process in that suit, it would keep jurisdiction, although the citizenship of the parties would not give it.

In the case of Clark v. Matthewson, 12 Peters, 170, a bill was filed by a non-resident in the United States Court against certain residents of Rhode Island. He afterwards died, and his administrator was appointed, who was a citizen of Rhode Island. He afterwards came in and filed a bill in the nature of a bill of revivor. The court held that as the suit in revivor was not an original suit, that it could be maintained, notwithstanding the citizenship of the parties.

In the case of Guev. The Tide Water Canal Company, decided by this court in 1860, reported in 24 Howard, 262, a levy had been made by virtue of an execution issued out of the United States Circuit Court of Maryland, and a seizure been made of property and franchises of the defendant; the defendant then filed its bill in the same Circuit Court, asking for an injunction, and it was granted by the court.

In Freeman v. Howe, 24 Howard, 451, the facts of which will be hereafter more particularly referred to, but which was a case directly in point, the court say (p. 460): "Another misapprehension under which the counsel for the defendant in error labors, and in which the court below fell, was in respect to the appropriate remedy of the plaintiffs in the replevin suit for the grievances complained of. It was supposed they were utterly remediless in the Federal courts, inasmuch as both parties were citizens of Massachusetts. But those familiar with the practice of the Federal courts have found no difficulty in applying a remedy, and one much more effectual than replevin, and more consistent with order and

harmony of judicial proceedings. The principle is, that a bill filed on the equity side of the court to restrain or regulate judgments or suits at law in the same court, and thereby prevent unjust or inequitable advantage under mesne or final process, is not an original suit, but ancillary and dependent, supplementary merely to the original suit out of which it had arisen, and is maintained without reference to the citizenship or residence of the parties."

In Watson v. Sutherland, 5 Wall., 74, an execution was issued out of the Circuit Court of the United States for Maryland, levied on the property of Sutherland, who was in possession of the property within the State. He filed his bill setting up that the property was his, setting up that his business would be irretrievably injured and broken up by the sale of the goods under execution, so that trespass would not be a remedy to him. The court took jurisdiction of the case and granted an injunction. So far as we are able to see, the case involves the very principle for which we are contending. A reference is made in the opinion of the Court to the case of Van Norden v. Morton, 99 United States Supreme Court Rep., 378. This was a case where a levy had been made under execution, and a party filed a bill on the equity side of the court, asking that the Marshal be enjoined; asking further for a decree for special damages for the detention. It does not appear whether he was a citizen of Louisiana or not, or that any objection to his commencing any action in the United States Court by reason of his residence existed, and none was raised. It was held that inasmuch as in the case there was no showing that the action of trespass would not furnish him a full and complete remedy, or that any common law action for damages would not furnish him a full and complete remedy, equity would not take jurisdiction of the case; and second, that even if it should be plain that he had a right to an action giving him a specific return of the property, that such action existed under the code of Louisiana, and the court say, page 381: "*With the criterion before us, we are of the opinion that the remedy provided by the code of*

practice of Louisiana is a simple application to the court from which the writ issued to remedy the evil of an erroneous levy of the execution." In other words, this court holds that where the statute provides an adequate remedy by an ancillary proceeding, and not by separate suit to determine the ownership of property seized under execution, which remedy the party could avail himself of in the United States Court on the law side, he is confined to that remedy ; for the holding of the court is, that this application is to be made to the court from which the writ issued. The principle for which we contend, as to the remedy, was also sustained by the following authorities :

Chapin vs. James, 14 Am. Law Reg., N. S., 215.

Brooks vs. Montgomery, 23 La. Ann., 450.

Munson vs. Harroun, 34 Ill., 422.

From these authorities we think it is plain, first, that the plaintiff in this suit had a complete remedy by suit against the officer for trespass. Second, that in case, from any circumstances that do not appear in this case, trespass would not be a complete remedy, a complete remedy existed by the filing of an ancillary bill on the equity side of the court based on the fact that the remedy by trespass was an inadequate one, and that no proper proceeding was provided on the law side of the United States Court.

Coming now to the main question, we know of no better way to examine it than by following the course of judicial opinion thereon, as expressed in the several reported cases. As early as 1804, in the case of Payne v. Drewe, reported in 4 East., 544, where the question arose as to the respective rights of officers holding process from the courts of law and chancery, Lord Ellenborough in summing up the law at that time, says : "It appears to me, therefore, not to be contradictory to any cases nor any principles of law, and to be mainly conducive to public convenience, and to the prevention of fraud and vexatious delay in these matters to hold that where there are several authorities equally competent to bind the

goods of a party when executed by the proper officers, they shall be considered as effectually, and for all purposes bound by the authority which first actually attaches upon them in point of execution, and under which an execution shall have been first executed."

The same principle was laid down in the case of Russell v. East Anglian Railway Company and others, 3 MacNaghten and Gordon 104, where a law court endeavored to seize property from the possession of a receiver appointed by a court in chancery. The court held that the receiver having been in pessession, no other court had a right to interfere with that possession, or determine the question whether or not it was rightful.

The first case cited in this country is the case of Slocum v. Maybury, 2 Wheat. 9, decided in 1817. In that case a vessel was seized by an officer and detained under the embargo act. No authority was given by the act for the detention of the cargo. Replevin was brought in the state court for the cargo. In the opinion of Chief Justice Marshall, he says: "This, however, being an action which takes the thing itself out of the possession of the officer, could certainly not be maintained in the State Court, if, by the act of Congress it was seized for the purpose of being proceeded against in the Federal Court," and on the ground that the seizure was only of the vessel, and not of the cargo, replevin of the cargo was permitted. The case stands squarely on the principle we have announced, and there is no question in it in conflict with the principles which we seek to maintain.

Of this case—Slocum v. Maybury—the court say in Freeman v. Howe, 24 Howard, 458, speaking in reference to a claim made that it was against the general doctrine claimed: "We have examined the case attentively, and are satisfied that this is a misapprehension. There was no interference there with goods seized under the process of a Federal Court, and in the custody of the Marshal, nor any attempt to draw questions involved in a suit instituted in a Federal Court into a State Court

for decision. It is quite apparent from the opinion of the court, if this had been the question before it, what would have been the decision."

In re Ship Robert Fulton, decided in 1826, reported in 1 Paine's C. C., 625, the sheriff under state process had levied on a ship, which the marshal afterwards undertook to seize. Held, that by the service of the State attachment, the property came into the custody of the State court, and the marshal had no right to seize it.

In the case of Hanna v. Steinberger, 6 Blackf., 520, it was held that where a marshal levied an execution in the Federal Court on the goods of a stranger to the execution, he violates the law of the State, and may be sued in its courts by the injured party. It seems to have been based on a misapprehension of the case of Slocum v. Maybury. No mention whatever is made of the real question in issue, which is: Which court shall determine the question as to its jurisdiction, the court issuing the process or some other court? And we do not know of its being followed by the courts of that State, or of any other.

In Harris v. Dennie, a case decided in 1830 by this court, 3 Peters, 304, an officer of the State attached goods which were in store in the United States Custom House. Afterwards they were attached and seized by the United States Marshal under a subsequent attachment to the State attachment. It was held here that the property could not be attached while in the custody of the United States. That an attachment so attempted to be laid upon it was void, and that the attachment of the Marshal put the property in the possession of the United States Court, and must be sustained.

In the case of Hagan v. Lucas, 10 Peters, 400, it was held, where a question arose as to the respective rights of the marshal and sheriff by virtue of respective levies and seizures under State and United States process, that "property once levied on remains in the custody of the law, and is not liable to be taken by another execution in the hands of a different officer, and especially an officer acting under a different juris-

diction. Had the property (in this case slaves) remained in the possession of the sheriff under the first levy, it is clear the marshal could not have taken it in execution, for the property could not be subject to two jurisdictions at the same time. The first levy, whether it were made under the Federal or State authority withdraws the property from the reach of the process of the other."

In the case of Wallace v. McConnell, 13 Peters, 143, the same doctrine was laid down by this court. Suit had been brought on a note, in the United States Circuit Court. Defendant interposed a plea of *puis darrien continuance* in bar of the original suit, on the ground that the debt had been attached by a creditor of plaintiff, and that on said attachment judgment was had against him, the defendant. In commenting upon this case, Thompson, J., who delivers the opinion, says: "The plea says that the proceedings in attachment were instituted after the commencement of this suit. The jurisdiction of the District Court of the United States, and the right of the plaintiff to maintain that suit, having attached that right could not be arrested or taken away by any proceeding in any other court. This would produce a collision in the jurisdiction of courts that would extremely embarrass the administration of justice. If the doctrine be well founded, the priority of suit will determine the right; the rule must be reciprocal; and where the suit in one court is commenced prior to the institution of proceedings in another under attachment, such proceeding cannot arrest the suit."

In the case of Brown v. Clarke, 4 How. 15, decided by this court in 1846, the case of Hagan v. Lucas, 10 Peters, 400, was again referred to, and the doctrine thereof re-affirmed on the point in question.

In Peck v. Jenness, 7 How. 625, decided in 1849, Jenness and others sued Peck in the state court of New Hampshire, commencing by seizing his property by attachment. Afterwards defendant appeared, setting up a judgment of bankruptcy subsequent to the commencement of the suit. To this plaintiff replied that he had seized property under attachment and

on which he held a lien; to this defendant rejoined, that his assignee in bankruptcy had secured an order of the United States District Court requiring the sheriff to give up possession of the goods so seized under attachment. A reversal of this judgment was sought on the ground that no personal service had been obtained. The right to the possession on which the lien depended had been taken away by the order of the United States Court, and the lien of the attachment destroyed. In the course of their opinion, Judge Grier says: (P 624) "It is a doctrine of law too long established to require a citation of authorities, that where a court has jurisdiction it has a right to decide every question which occurs in the case, and whether its decision be correct or otherwise its judgment, until reversed, is regarded as binding in every court; and that where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it have once attached, that right can not be arrested or taken away by proceedings in another court. Neither can one take property from the custody of the other *by replevin or any other process*, for this would produce a conflict extremely embarrassing to the administration of justice." The judgment below was affirmed.

In Williams v. Benedict, decided by this court in 1850, 8 How. 107, an attempt was made by virtue of a judgment in the United States Court to seize certain property then in the hands of the administrator of an insolvent estate in the State Court. The court held that the property in the hands of the administrator was in the custody of the State Court; "and if the marshal were permitted to seize them under an execution it would not only cause manifest injustice to be done, but would be the occasion of an unpleasant conflict between courts of separate and independent jurisdiction."

In Peale v. Phipps, 14 How. 374, the property of an insolvent bank was in the hands of a trustee appointed by a State Court, for liquidation. An attempt was made to subject it by seizure from the process in the United States Court. The court say (p. 374): "The property, in legal contemplation was in the custody of the court of which he was the officer

and had been placed there by the laws of Mississippi, and while it thus remained in the custody and possession of that court, awaiting its order and decision, no other court had a right to interfere with it, or to wrest it from the hands of its agent."

In Pulliam v. Osborne, decided in 1854, 17th How. 471, it was a contest as to the superior validity of executions issued out of a State Court, and United States Court, in which the execution from the State Court by statute was made a lien from the time of its issue; but the property was seized by the marshal under the execution from the United States Court first. After citing several of the cases above referred to, with approval the court say, "but no such case (that is the seizure of the same property under process of courts of different jurisdiction) can exist. Property once levied on remains in the custody of the law, and is not liable to be taken by another execution in the hands of a different officer, and especially an officer acting under different jurisdiction."

In 1875, Curtis, Circuit Judge, in the case of the Oliver Jordan, decided in 2 Curtis Rep. 415, held substantially the same doctrine. In this case a vessel had been seized by the state court on attachment; subsequently an attempt was made to seize it under a libel from the United States Court. The court says: "This vessel being in the custody of the law of the State the marshal could not lawfully execute the warrant of arrest. Under our system of government there is no mode of preventing a conflict of jurisdiction, but to consider the persons and property which are in the custody of the law of the State to be withdrawn from the process of the courts of the United States, except in those cases where Congress has specially provided for an exercise of the supremacy of the laws of the United States. And, on the contrary, persons and property in the custody of the law of the United States as not being subject to any State process. This rule has been frequently laid down and applied."

The same court in that same year, at the October term, enjoined the levy of an execution issued in the State Court against the property of

one partner, on a bill filed by the other partner, for a settlement of the partnership accounts, on the ground that the sheriff had no right to levy on the goods of one partner. We do not think this case is good law, or that under like circumstances the United States Court would now issue an injunction. It belongs to a class of cases wherein the court took it for granted that the fact was as claimed, when the real question was, what court had a right to determine that fact. We do not know of its being followed by any case in this court.

The case of Taylor v. Carryl, 20 How., 584, decided by this court in 1857, arose first in the Supreme Court of Pennsylvania. The vessel "Royal Saxon" was seized under an attachment by the State Court, and the sheriff was in possession when the Marshal of the United States Court undertook to seize it under a libel in admiralty. A sale was had under both processes, and the case arose on the contest between the purchasers as to the validity of the sales under which they respectively claimed. The Supreme Court of Pennsylvania held, that it being in possession of the property, the seizure of the Admiralty Court was a nullity. The case came to this court and was affirmed. A dissenting opinion was given by Chief Justice Taney, but not on any ground in relation to this question, but simply upon the relative powers of courts of common law and admiralty. In reviewing the authorities the court re-state the rule claimed by us as stated in the prior cases, including the statement in Peck v. Jenness. "Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice." In his dissenting opinion Chief Justice Taney, in referring to these cases, says: "That the court did nothing more than adhere to a rule which is universally recognized by courts of justice; that is, that between courts of concurrent jurisdiction, the court that first obtained possession of the controversy, or of the property in dispute, must be allowed to dispose of it finally without any interference or interruption from co-ordinate courts; and this rule applies where the concurrent jurisdictions are two courts of

the United States, or two courts of a State, or one of them the courts of a State, and the other a court of the United States. It was no new question when the case of Hagan v. Lucas came before this court, but an old and familiar one upon which courts of concurrent jurisdiction have necessarily uniformly acted in order to prevent indecorous and injurious conflicts between the courts in the administration of justice."

In the case of Gilman v. Williams and others, decided by the Supreme Court of Wisconsin, 7 Wis., 287, the court held, where property had been seized by a Marshal of the United States, which by the State law was exempt, that replevin could be maintained in a State Court, and the title to the property could be tried. In this opinion the court say: "The first question presented by the pleadings in this case is one which has to a small extent become the subject of judicial examination. It is well that it may now be settled for the future guide of executive officers as well of the State Courts as of the District Court of the United States, for it is very desirable that the executive officers of both courts have a rule of action in the premises upon which they may rely as authority." The court then proceeds without a reference to any authorities, or to the real reason of the rule, to decide the case upon general principles, and to hold that replevin was maintainable. In 16 Wis., in the case of Booth v. Ablem[illegible]. 485, the personal property of B. had been seized upon an execution issued out of the Federal Court, and he brought an action in the State Court against the marshal to recover possession. This was in 1863. The State Court dismissed the replevin suit on the ground that it had no jurisdiction, but refused to make an order for the return of the property so taken, leaving the property in the possession of the plaintiff in replevin. The case went to the Supreme Court of Wisconsin, and it was decided that the court should have made an order giving up possession of the property when it dismissed the suit. In referring to the authorities, after citing some of the cases above referred to, the court say: "The fact, therefore, that the property in controversy was in the possession of the marshal under an execution issued upon a judgment rendered in the Dis-

trict Court against the respondent, furnished an impregnable defense to the action." So that it would appear that the case in 7 Wisconsin is no longer law in that State, and has not been for many years. The same principle was decided in Crane v. McCoy, 1 Bond C. C. R. 422.

In 1860 this court decided the case of Freeman v. Howe, reported in 24 How. 451. This case came up from the Supreme Court of Massachusetts, and was reported first in 14 Gray, 573. It arose under the folfollowing circumstances: Certain freight cars were attached by the United States Marshal on writs issued by the United States Court. Replevin was brought for them in a State Court by the mortgagees, who were not the defendants in the original execution. It was claimed that inasmuch as the suit was commenced by strangers to the writ, the State Court had a right to determine whether the property seized was the property of the defendant in the writ or not, under the claim that if it was not the property of the defendant in the writ, it could not be said to be in the custody of the United States Court, being almost identically the claim made by the Supreme Court of the State of Michigan in this case. The case came to the Supreme Court; and, after a full review of all the authorities, the court held, first: that the right to determine whether or not the property seized was the property of the defendant in the writ, was in the court having possession of the property, and under whose writ the property had been seized; that it made no difference whether the property was seized under mesne or final process, or whether it was in a proceeding *in rem* or not. This court say, (p. 457,) "Another and main ground relied on by the defendants in error is, that the process in the present case was directed against the property of the railroad company, and conferred no authority upon the Marshal to take the property of the plaintiffs in the replevin suit. But this involves a question of right and title to the property, under the Federal process, which it belongs to the Federal and not to the State Court to determine. This is now admitted; although a point is made in the brief of counsel for the defendant in error that this court had no jurisdiction of the case; it was given up on the

argument. And in the condition of the present case, more than this is involved, for the property having been seized under the process of attachment and in the custody of the Marshal, and the right to hold it being a question belonging to the Federal Court under whose process it was seized, to determine, there was no authority, as we have seen, under the process of the State Court, to interfere with it." . Speaking of the statement of Chancellor Kent in his commentaries, (Vol. 1, p. 410,) the court add: "The error into which the learned Chancellor fell from not being practically familiar with the jurisdiction of the Federal Courts, arose from not appreciating, for the moment, the effect of transferring from the jurisdiction of the Federal Court to that of the State, the decision of the question in the example given; for it is quite clear, upon the principles stated, that the jurisdiction of the former, and the validity and effect of its process would not be what the Federal, but a State Court might determine. No doubt, if the Federal Court had no jurisdiction of the case, the process would be invalid, and the seizure of the property illegal, for which the aggrieved party is entitled to his remedy. But the question is, which tribunal, the Federal or State, possesses the power to determine the question of jurisdiction or validity of process? The effect of the principle stated by the Chancellor, if admitted, would be most deep and extensive in its operation upon the jurisdiction of the Federal Court, as a moment's consideration will show. It would draw after it into the State Courts, not only all questions of the liability of property seized upon mesne and final process issued under the authority of the Federal Courts, including the admiralty, for this court can be no exception for the purposes for which it was seized, but also the arrest upon mesne and imprisonment upon final process of the person in both civil and criminal cases. For in every case the question of jurisdiction could be made, and until power was assumed by the State Court, and the question of the jurisdiction of the Federal Court was heard and determiued by it, it could not be known whether in the given case it existed or not. We need scarcely remark, that no government could maintain the administra-

tion or execution of its laws, civil or criminal, if the jurisdiction of its judicial tribunals were subject to the determination of another."

In the case of Munson v. Harroun, 34 Ill., 422, the marshal under an execution against one Wright, had seized certain goods claimed by Harroun, who thereupon brought replevin in the state court. The court say: "We are of the opinion that the State Court cannot lawfully interfere with the execution of final process of the Federal Court at the instance and for the protection of a stranger, alleging that his property has been tortiously seized in execution to satisfy the debt of another. While the property claimed by Harroun yet remained in the custody of the marshal, who had seized and was holding it on final process out of the Federal Court; that court, so far as reaching the property itself, had the exclusive authority to inquire into and determine the question of the rightfulness of such custody, upon which the proper execution of its process depended. Had the defendant in error sought relief in that court while the property was thus held, he could have been protected in all his rights. If he did not choose to adopt that course, he had still his action of trespass or trover in the State Court against the marshal or his deputy for the wrongful seizure; but since replevin would work an interference with the process of the Federal Court, that action cannot, in such case, be maintained." The same doctrine is approved in the case of Samuel v. Agnew, 80 Ill., 556.

In the case of Buck v Colbath, 3 Wall., 340, in referring to the case of Freeman v. Howe, the court say: "We, are, however, entirely satisfied with it, and with the principle upon which it is founded, a principle which is essential to the dignity and just authority of every court, and to the comity which should regulate the relations between the courts of concurrent jurisdiction. That principle is, that whenever property has been seized by an officer of the court by virtue of its process, the property is to be considered as in the custody of the court, and under its control for the time being, and that no other court has a right to interfere with that possession unless it be some court which may have a direct, supervisory control over the court whose process has first taken possession, or

some superior jurisdiction in the premises. * * * * This is the principle upon which the decision of this court rests in Taylor v. Carryl and Hagan v. Lucas, both of which assert, substantially, the same doctrine. A departure from this rule would lead to the utmost confusion, and the endless strife between courts of concurrent jurisdiction deriving their powers from the same sources. And how much more disastrous would be the consequences of such a course, in the conflict of jurisdiction between courts whose powers are derived from entirely different sources, where their jurisdiction is concurrent as to the parties and the subject matter of the suit."

In 1868, in the case of DeVisser v. Blackstone, 6 Blatch. C. C. R., 236, it was held that any attempt on the part of a State Court to enforce a lien on property which was already in the possession of a receiver of the United States Court, would not be permitted.

In the case of Bill v. the New Albany &c. Railway Co., 2 Bissell, 390, the property of a railroad company was in possession of a receiver of the United States Court, who, without authority from the court which appointed him, turned over possession to a receiver appointed by the State Court. Afterwards, an application was made to the United States Court by certain bondholders under the mortgage which the original suit was filed to foreclose, asking for the appointment of a receiver to take possession of the road; and the court held that the receiver of the United States Court having had original possession, all of the proceedings of the State Court to deprive him of that possession, were illegal.

In the case of Johnson, Assignee v. Bishop, 1 Woolworth C. C. R. 324, decided in 1868 in the Eighth Circuit, Miller J. says: "The property is held by sheriff under writs rightfully issued, and his possession is the possession of the court, by the command of whose writ he seized it; and so long as the proceedings in virtue of which it was taken, are pending, that possession will not be interfered with by any other court. This general principle has been acted upon in England in many cases in which two courts of concurrent

jurisdiction were sought to be brought into collision. By this salutary rule, harmony is maintained between the several Superior Courts. The importance of this rule, and of scrupulously obeying it in this country, is greatly increased by the fact that Federal and State Courts, although exercising their jurisdiction in the same territory, over the same subjects, and often the same class of litigants, draw their existence from different sources, and are to one another foreign tribunals. In no other way can unseemly and mischievous collisions be avoided."

It is claimed that the case of Dunn v. Vail, 7 Mart. (La.), 416, is against the rule we claim. Although we have been unable to examine the case, the Supreme Court of the same State in 1871, in the case of Brooks v. Montgomery, 23 La. Ann., 450, cite Freeman v. Howe, and hold the doctrine we claim to the fullest extent, although the party asking the aid of the State Court was a stranger to the writ under which the property was seized. The court in its opinion says: "The court issuing a process ought to have the right to determine its jurisdiction as to any seizure thereunder, in order to avoid conflict between the Federal and State Courts. The two systems of judicature could not be administered in harmony in the same State, if the jurisdiction of the court of one system as to the personal things seized by its process, is to be measured by the court of the other."

In the case of Kern v. Huidekoper, 103 U. S. Sup. C. R., 491, Justice Bradley says, referring to the cases of Taylor v. Carryl, Freeman v. Howe and Buck v. Colbath: "These cases decide that the property held by an officer of one court by virtue of process issued in a cause pending therein, cannot be taken from his possession by the officer of another court of concurrent jurisdiction, upon process issued in another case pending it the latter court."

Prior to this time, and in 1873, in the case of Chapin v. James, decided by the Supreme Court of Rhode Island, and reported in 14 American Law Register, 214, where a stranger undertook to enjoin in a State

Court the United States Marshal from proceeding to sell on execution on the ground that he was a stranger to the writ in the original case, and was entitled to the property, the court sustained the principle contended for, after a full examination of the authorities.

In the case of Hammock v. the Loan and Trust Co., 105 U. S., 77, decided by this court in 1881, the cases of Taylor v. Carryl, Freeman v. Howe and Hagan v. Lucas, were referred to with approval.

CONCLUSION.

We have no stronger reasons for the doctrines for which we contend than those contained in the decisions of this court, which we have cited. We can add nothing to the clearness with which those reasons are stated. We have contented ourselves with calling attention to them. We think they plainly establish the following conclusions:

1.

Whenever property has been seized by an officer of the court by virtue of its process, the property so seized is to be considered and treated as in the custody of the court; and this rule applies to property seized, as in this case, by the marshal under an execution issued by the United States Court.

2.

While property is so in the possession of a court, no other court, unless having supervisory jurisdiction, has a right to interfere with its possession to determine whether that possession is or is not lawful. The question of a right to possession is a question of jurisdiction, and must be determined by the court under whose process the seizure was made; and the action in this case, being an action to interfere with that possession, cannot be maintained in the State Court as to property in the possession of the United States Court.

3.

This rule is not one confined to or arising out of the relations of State and National Courts; it arises from the very nature of courts of co-ordinate jurisdiction. It has its origin in the necessity of the case, and its support in a long line of decisions, in which it has been accepted and affirmed by the highest courts of this country and England, and has been acquiesced in by most of the State Courts; and they, in their turn, have insisted on it as against the Federal Courts, whenever the possession was in them.

If these conclusions are correct, as we submit they are, the plaintiff in error is entitled to the relief he asks, that the judgment entered in this case in the Supreme Court of the State of Michigan be reversed, and a judgment entered in accordance with the judgment of the Circuit Court for the County of Kent for a return of the property to the plaintiff in error in this court and the defendant in replevin below.

ROGER W. BUTTERFIELD,
Att'y for Plaintiff in Error.

J. W. CHAMPLIN,
Attorney and of Counsel.

EXHIBIT A.

Opinion Heyman v. Covell, 36 Mich., 157.

Campbell, J.: Plaintiff having commenced a suit in replevin in the Circuit Court for Kent County, defendant pleaded in abatement that he took the goods as deputy marshal under an execution issued out of the Circuit Court of the United States for the Western District of Michigan, in favor of James McLean and Henry H. Stotesbury against Adolph Heyman.

To this plea a demurrer was put in, but overruled, and judgment entered that defendant was not guilty and that the property be returned to defendant. The form of this judgment is the same used when the merits have been tried, but this need not be considered.

It is not averred that this execution was issued on any judgment, or that any judgment against either Adolph or Sarah Heyman had been rendered. Neither is it averred that the property was levied on as belonging to Adolph Heyman.

Without discussing at length how far, under the practice governing the procedure of the courts of the United States sitting within this State, any inquiry could be made in aid of the plaintiff which would come within the constitutional right of persons whose property has been taken by a plain trespass not to be deprived of due process of law for its recovery, we do not think any case is made by this plea.

While most of the decisions of the United States Supreme Court bearing on the immunity of property held under one jurisdiction from seizure by another, have arisen under very different circumstances from the present, and while, though there are some *dicta*, there is no decision, so far as we know, which holds that property of strangers to a final execution is brought by seizure under it within the exclusive control of courts

of the United States, we find no decision or dictum which would maintain any such doctrine in the absence of a judgment.

The whole question has been made to turn on the fact that a court had possession of the property because its jurisdiction had attached in a cause in which the process was issued. Although there may be no liability for trespass against an officer who honestly takes property under a process apparently valid in form, no one has ever imagined that such a seizure could affect the condition of the property for any purpose, if supported by no record or proceedings in court. And where property is taken which is not that of the execution debtor, the taking is necessarily tortious and is always a trespass. Buck vs. Colbath, 3 Wall., 334. It was held in that case that a seizure under a good writ against the wrong person did not draw into the Federal Courts the determination of title to the property against a stranger to the writ, and that the court could grant the officer no protection against the consequences of his own wrongful act. And it would be absurd to hold that where a writ never issued under any judgment or order of the court at all, the court could take any more notice of the right of property than if it had been seized without a writ.

A plea in abatement to the jurisdiction must always show another forum, where the rights have already become subject to judicial authority. Watson v. Jones, 13 Wall., 679.

It must also be certain, according to the most rigid rules of precision. Wales v Jones, 1 Mich., 254 Belden v. Laing, 8 Mich. R., 500. The omission here is neither formal nor technical, but substantial, and the plea fails to show any ground of abatement.

If the defendant should show a valid judgment upon a trial on the merits, the other questions argued will come up for decision, and may then be disposed of.

The judgment must be reversed, with costs, and the demurrer sustained, the defendant to answer over according to the usual practice.

The other justices concurred.

111-176

UNITED STATES OF AMERICA.

SUPREME COURT.

OCTOBER TERM. 1883.

LEONARD COVELL,
Plaintiff in Error,

vs.

SARAH HEYMAN,
Defendant in Error.

Error to Supreme Court of Michigan.

BRIEF FOR DEFENDANT IN ERROR

L. D. NORRIS,
Counsel.

UNITED STATES OF AMERICA.

Supreme Court of the United States.

LEONARD COVELL,
Plaintiff in Error,
vs.
SARAH HEYMAN,
Defendant in Error.

October Term, 1883, No. 255.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT

This is an action of replevin, brought by defendant in error, who was plaintiff below, against plaintiff in error, defendant below, in the Circuit Court for the County of Kent, Michigan. In that court defendant had judgment upon findings of fact. Mrs. Heyman prosecuted a writ of error, to the Supreme Court of Michigan, which reversed the judgment of the Circuit Court, and ordered the entry of judgment for plaintiff upon the findings. Heyman vs. Covell, 44 Mich., 332. Defendant Covell sued out a writ of error to this court.

I.

THE FACTS.

The record discloses the following:

In January, 1874, Adolph Heyman, the husband of defendant in error, was the owner of a stock of dry goods, etc., of which the goods replevined from plaintiff in error formed a part; the goods were then at Quincy, Ills. At or about that date, Heyman made an assignment for the benefit of his creditors. The assignee sold to one Leopold Wiseman, who was defendant in error's brother, for $2,000. Wiseman, after the sale, gave the goods he had so purchased to defendant in error. (R. p. 23, f. 52.)

In May, 1874, the goods in question were removed to Grand Rapids, Mich., placed in a store, and the dry goods business was carried on therewith by Mrs. Heyman, her husband acting as her agent. (R. p. 23, f. 52.) This continued to the time the plaintiff in error levied on the goods.

July 9th, 1874, James McLean and Henry W. Sotesbury sued *Adolph* Heyman in the Circuit Court of the United States, for the Western District of Michigan, (R. p. 23, f. 53,) and at the October term, 1874, of that court, recovered judgment against him for $2,089.04 and $31.10 costs.

November 9th, 1874, execution issued upon this judgment against the goods and chattels, and for want thereof, against the lands and tenements of *Adolph* Heyman, (R. p. 23, f. 53.) This execution came to the hands of the plaintiff in error, who was one of the Deputy United States Marshals for the Western District of Michigan, (R. p. 23, f. 54,) who, Nov. 18th, 1874, during the life of the writ, levied upon the goods described in the declaration. (R. p. 23, f. 54.)

Defendant below, Covell, had notice at and before his levy, that plaintiff below, *Sarah* Heyman, was the owner of the stock seized. (R. p. 23, f. 54.) It was "assumed by counsel for both parties," in the

Supreme Court of the State of Michigan—" that the ground of decision," —by the Kent Circuit Court,—" was, that defendant's possession, " *though wrongful*, must prevail over *State* process, issued in favor of the " *real* owner." (R. p. 51, f. 116.) On the same day, the property so seized, was replevined from Covell under the writ of replevin in this cause, (R. p. 23, f. 54,) and was bonded to the plaintiff in error, as the statutes of the State require.

2 Howell's Comp. Laws of Mich., §8324, which reads as follows :

" Before the officer shall deliver such " (replevined) " property to the plaintiff, such plaintiff, or someone in his behalf, shall execute to such officer, and his assigns, with the addition of his name of office, with sufficient surety, to be approved by such officer, in a penalty of not less than ($100,) and at least double the appraised value of such property ; conditioned that the plaintiff will prosecute the suit to effect, and that if defendant recover judgment against him in the action, he will return the same property, if return thereof be adjudged, and will pay the defendant all such sums of money as may be recovered by such defendant against him in such action."

§8347 provides that defendant may waive return, and take judgment for the value of the replevined property.

The declaration alleged the detention of the goods by Covell ; that they were plaintiff's ; that Covell had been requested to deliver the same to plaintiff and refused. (R. p. 11.) The defendant Covell pleaded the general issue, with *notice* thereunder. No plea in *abatement*.

1 That he was Deputy United States Marshall.

2 The issuing of the execution before referred to, and its receipt by him.

3 That in accordance with the *command* (?) thereof he levied upon the property replevined.

4 That at the time of the commencement of this action, he had pos-

session of the replevined goods under his execution, and that, was the only detention of the goods, etc (R p., 20 and 21.) This notice under the general issue, nowhere alleges that Covell seized the replevined goods, *as the property of Adolph* Heyman, the defendant in the execution, and *no attempt* was made on the trial to prove *that fact.*

The cause was tried (the second time) Oct. 23d, 1877, by the court without a jury (R., 22., f. 50). A finding of facts was made Aug. 4th, 1879, (R., p. 22 to 24), and amended Dec 16, 1879, (R., p. 24., f. 56.) Judgment for defendant on finding as amended, was entered Feb. 2nd, 1880, (R., p. 21., f. 49,) that the goods replevined *be returned.* Bill of exceptions was settled Feb 18th, 1880, (R., pp. 22 to 48) Writ of error to Michigan Supreme Court February 12th, 1880, (R., p. 48), and wa there decided October 13th, 1880. It was afterwards removed to this court.

The record contains *all* the evidence given on the trial below (R., p. 25, f. 59) upon which one finding was refused (R., p. 24, f. 56) and another made (R., p. 22 to 24.)

Three *facts* appear in this record and are uncontradicted.

1. That the replevined property *belonged* to the plaintiff, Sarah Heyman.

2. That defendant Covell seized the same under an execution against the goods of a stranger, to-wit, Adolph Heyman.

3. That defendant Covell made no attempt to justify this seizure, except by asserting (*a*) that he was U. S. Marshal, (*b*) had seized the goods under *final* process from the United States Court (*c*) and therefore no State Court could issue process to re-take the goods seized.

No other defence was made or attempted to be made.

II.

The record then presents to this court this question, with others :

If a United States Marshal under an execution against A, levy upon the property of B, can he hold or have return of that property, against the process of a State court having jurisdiction in the premises, by simply showing that he seized, under *final* process from a United States court against a stranger to the execution record?

In other words, can *final* process from the United States Courts shield *a wrong-doer*, leaving the injured person *remediless?* Plaintiff in error relies on Freeman vs. Howe, 24 How., 450, as deciding this question in the affirmative.

That case was this:

The United States Marshal had seized, upon *original* process and *as commencement of suit*, certain property *belonging to the person against whom* the writ was directed. These goods were replevined from the United States Marshal *by the mortgagees* thereof, by authority of process from the State Court.

It was held that *Replevin* from a State Court would not, *under such circumstances*, lie against the United States Marshal.

The case at bar is entirely different.

In Freeman vs. Howe, the Marshal had seized the property of the person against whom his *original* process was directed, *as commencement of suit.*

Certain lien-holders, whose rights could in no way be affected by the Marshal's seizure, since their lien on the property, if sold, would follow the proceeds, replevined the property under process from the State Court. The *litigation* was *pending.* This Court held this an unwarrantable interference with the Conrt and its officers, in the due performance of their duty.

But in the case at bar, the Marshall had seized upon *final* process, *property of a stranger.* The *litigation* was *closed.* At the time of this

seizure under the writ of replevin from the State Court, he was not engaged in the performance of his duty under process from the United States Court, but in the commission of a tort—a trespass, wholly unwarranted, *and outside* the *command* of his writ. His levy on Mrs. Heyman's property was void *ab initio*. He was liable to Mrs. Heyman in an *action of trespass* in the State Court.

Buck vs. Colbath 3 Wall 335.

Mathews vs. Densmore 3 Sup. C. Reporter 126.

Leroux vs. Hudson Ibid. 309.

Sharpe vs. Doyle 102 United States.

If he is liable *in trespass* why not *in replevin?*

In Van Norden vs. Morton, 99 United States, 379, per Miller, J., this court said, in a case where the Marshall had levied on the property of a stranger to the writ,

"The remedy in all time for this trespass which is a very common one, has been by an *action of replevin* to take the property out of the hands of the sheriff or marshal and return it to the owner, or to leave the officer to proceed with the sale of the property and sue him or the purchaser in trespass for its value, and for any incidental damage. In the one case the party whose property was wrongfully seized recovered possession of it In the other he recovered compensation for its loss. No case has been cited to us—we presume none can be found, where equity has interfered under such circumstances."

Replevin lies where trespass *de bonis* lies.

Rogers vs Arnold, 12 Wend., 39.

Seaver vs. Dignley, 4 Greenl., 306.

Badger vs. Phinney, 15 Mass., 359.

Braen vs. Ogden, 6 Holst., 370.

Rector vs. Chevalier, 1 Missouri, 345.

Wright vs. Armstrong, Breese, 130.

Chinn vs. Russell, 2 Blackf., 174.

"Whenever any goods or chattels have been unlawfully taken, * * an action of replevin may be brought for the recovery of the damages sustained."

2 Howells' Stat. of Mich., §8315.

There is good reason for the interchangability of these two actions. By one the plaintiff recovers the value of the property taken and damages. But there may be, and frequently are, cases, where value and damages are no compensation, or as is the case at bar, where the taking of the property will *close a store* and *destroy a business* or trade. In such cases, replevin is the *only* adequate remedy.

Is there any good reason for changing the above rule, to be found in the mere fact, that the trespasser was United States Marshal and levied under *final* process from an United States Court. Is an officer of the United States Court to have special privilege to seize *and keep* anybody's property?

Plaintiff in error maintains that Taylor, et al. vs. Corryl, 20 How., 583, as also Freeman vs. Howe, 24 Id., 50, *so decide*.

But in both the above cases, the possession of the officer originally levying was *rightful*. The officer had seized in the due performance of his duty, the property of *the defendant* in his writ. In some cases (of non-residence,) where the suit is beginning the custody of the property seized, is needful, to render the *jurisdiction* of the court effectual.

The cases above in effect decide, that where an officer, (say rather a court,) of one jurisdiction is *rightfully* in possession of property under writ, it cannot be disturbed by any process from another jurisdiction.

It has never been decided, that where a United States Marshal has wrongfully levied on property, not subject to his writ, he can justify his

trespass and go scatheless, by merely producing *final* process from a United States Court.

Any *dicta* in either of the above cited cases tending to the contrary, are *obiter*.

On the other hand should this court sustain the contention of the plaintiff in error, the defendant in error, (and all other like situated parties) *will be wholly without remedy*.

1. Would a bill in equity lie in the United States Court to restrain further proceedings under the execution, and determine Mrs. Heyman's title, as was suggested in Freeman vs. Howe? This court has held in a precisely similar case, that such a bill will *not* lie, that the United States Court has no jurisdiction.

Van Norden vs. Morton 99 U. S., 376.

2. If replevin will not lie, an action of trespass in the State Court would seem to be the only possible remedy; thereby overiding the state statute cited supra; at least when as here both Marshal and injured person are citizens of the same State.

In the case at bar, begun in 1874, (two trials in the Circuit and two in the Supreme Court) the action of trespass is *barred* by the statute.

Again in this case and very many others, which might arise, trespass alone would not give an adequate remedy.

1. Suppose the Marshal irresponsible—as is too often the case—and the value of the property seized in excess of the amount of his bond, or the bond already in judgment for its full penalty.

2. If the wrongfully seized property be such as the type machinery and plant of a daily newspaper, the seizure stops the publication of the paper, and greatly damages or wholly ruins its business and circulation. It is an inadequate remedy to sue in trespass and recover the value of the

property taken and such damage as could be shown. The greater part of the loss would be wholly intangible, and incapable of proof. Replevin would prevent the damage being done.

3. If the property seized be a picture or heirloom, valuable to its owner mainly from associations connected with it, is trespass an adequate remedy?

4. Independent of these considerations, one whose goods have been wrongfully seized, has the right to recover the same *in specie* by the action of replevin.

Shall he lose this right simply because the wrongdoer claims to act under *final* process from another jurisdiction, in the issue of which the Federal Court has had no voice, has made no order, and the possession of the seized property is in no way preliminary to a jurisdiction. then about to be exercised and continued.

Per Miller J., in Mathews vs. Densmore, *supra.*

"It had been supposed by many sound lawyers, after the case of Freeman vs. Howe, 24 How. 450, that no action could be sustained against the Marshal of the United States in any case in a State Court where he acted under a writ of the former court; but in Buck vs. Colbath, 3 Wall., 334, where this class of cases was fully considered, it was held that though the writ be a valid writ, if the officer attempt to seize property under it which does not belong to the debtor against whom the writ issued, the officer is liable for the wrongful seizure of property not subject to the writ."

Per Blatchford, J., in Leroux vs. Hudson, *supra.*

"If the case as to the Marshal and his deputies were one of jurisdiction, by citizenship of the parties, it would fall within the principles laid down by this court in Buck v. Colbath, 3 Wall., 334. The provisional warrant being one merely commanding the Marshal to seize the property of the debtors, it was for the Marshal to determine for himself, whether

the goods seized were legally liable to seizure under the warrant, and the Circuit Court could afford him no protection against the consequence of an erroneous exercise of his judgment in that determination. He was liable to suit in any court of competent jurisdiction, for injuries growing out of his mistakes. The State Court, in which the suit for trespass was brought was such a court, and that suit was an appropriate suit. The parties bringing it were entitled to proceed with that suit in that forum. As was said in Buck v. Colbath, there was nothing in the mere fact that the provisional warrant issued from a Federal Court," to prevent the Marshal from being sued in a State Court, in trespass for his own tort, in levying it upon the property of a man against whom the writ did not run, and on property which was not liable to it. This view was reaffirmed in Sharpe vs. Doyle, 102 United States, 686, and was there applied to a seizure under a provisional warrant in bankputpcy like that in the present case."

III.

The foregoing paragraph mostly relates to the reasons for its decision, assigned by the Michigan Supreme Court.

Heyman vs. Covell, 44 Mich., 332.

(R., pp. 50 to 53.)

IV.

It would seem that there are other errors in the record, for which that court's decision should be affirmed.

If the decision is right, the reason assigned therefor is immaterial.

Silsbury vs. Foote, 14 How., 218.

Wilson vs. Wager, 26 Mich., 452.

Wellover vs. Soule, 30 Id., 481.

McClung vs. Silliman, 6 Wheat., 598.

This court has ruled it to be a useless procedure to reverse a judgment and remand it to a State Court (because of a wrong reason), when if the cause *should* be remanded, that court might enter a second similar judgment, upon another and better reason, shown in the same record.

Irvin vs. Lowry, 7 How. 172

Collier vs. Stanbrough, 6 How. 14.

Is it certain that a Federal question, pure and simple is alone presented in this record?

The Supreme Court of Michigan, say, (R. p. 50, f. 116.) *dubitantur :*

"We have had some doubt whether the court below did not err in failing to find more specifically as requested." This court, if necessary, can resolve that doubt, in favor of the defendant in error.

The case is this :

1. The trial judge certifies that he has returned *all* the testimony (R. p. 25, f. 59) upon which his finding is based.

2. He was prayed by defendant in error, plaintiff below, to find (R. p. 25, f. 58) that defendant (the United States Marshal) was under instructions from the attorneys for the plaintiff in the execution, to surrender the property, when he had got a bond which was sufficient, and that he had acted upon such instructions and *voluntarily* surrendered the property to the sheriff when the writ was served upon him, etc.

3. The evidence upon which the prayer was asked, was that of the United States Marshal himself ; was undisputed and unchallenged. (See R. p. 36, f. 83.)

A. "I was under instructions from the attorneys."

Q. "Die they instruct you to surrender it ?"

A. "Yes, when I got the bond which was sufficient, they were satisfied."

4. It was error of law, to refuse to so find the evidence being distinct, clear and undisputed, and there was exception (R. p. 48, V and VI) and error was assigned thereon (R. p. 49, VI and VII.)

With such a finding lawfully in the case, the doctrine, *volenti non fit injuria*, applies.

This is not a Federal question.

V.

Again the Federal question sought to be raised, (Rev. statute, Sec. 709,) is, that of "an authority exercised under the United States * * or of a commission held, or authority exercised under the United States * * and the decision is against the title, right, privilege or immunity set up or claimed."

Now, the record shows :

1. That the authority exercised, (an execution levy—final process—upon property of a stranger to this execution record,) was not under the United States, but was an illegal and unauthorized act of the Marshal, taken at his own risk, and outside the command of his writ.

2. That this right, privilege or immunity was "*specially set up or claimed*" *by proper plea in abatement*, (R., p. 11 and 12, on the 30th day of December, 1874. Rev. Stat., Sec. 709.)

To this plea in abatement, there was special demurrer, (R., p. 16, f. 36,) Upon argument the trial court overruled this demurrer, and a return of the goods and chattels replevined, was adjudged. (R., p. 17, f. 38.)

This judgment was removed by writ of error to the Supreme Court and reversed, (R., p. 19, f. 43.) and the defendant was permitted to answer over ; a privilege he need not have accepted. (Heyman vs. Covell, 36 Mich., 157.)

Here was a Federal question, plain and simple, that could have been so shaped, as to obtain review in this court, but it was not.

A plea of the general issue, calling for a trial upon the merits was interposed, (R., p. 20 and 21,) and a new trial upon the merits, and a new judgment was had.

It is true, that to this plea of the general issue, was appended *a notice*, that this defence would give in evidence, (whether in bar or otherwise, is not stated, R. p., 20 and 21.) the matter formerly plead in abatement.

This was in 1877, *three years* after the plea in abatement.

This notice, however, is not under the rules and practice obtaining in the State court and under the Federal statute, a privilege or immunity "*specially set up or claimed.*" It must always have been by personal sworn plea in abatement, as defendant below in the first instance, well understood, observed and then abandoned. A plea to the merits, is an abandonment and waiver of a prior plea in abatement.

1 Chitty Pl., 15 Am. Ed., 440–1.

R. R. Co. vs. Harris, 12 Wall., 84.

Clearwater vs. Meredith 1 Ib., 42.

Aurora vs. West, 7 Id., 92.

Young vs. Martin, 8 Id., 354.

For *this reason* no Federal question is here.

Finally, this court is respectfully prayed, should it find error in the record, (which can by no means be expected) requiring a reversal, to indicate what now, after the lapse of 10 years shall be the remedy, for the assertion of the defendant in error's undisputed rights as *sole* owner of this property.

L. D. NORRIS,

Of Counsel for Defendant in Error.

111-116

Supreme Court of United States.

LEONARD COVELL,
Plaintiff in Error,
vs.
SARAH HEYMAN,
Defendant in Error.

OCTOBER TERM--No. 255.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

Since the briefs on both sides were printed, and sent forward, they have been exchanged here—Grand Rapids, Mich.

This court has also filed its decision in Krippendorf vs. Hyde and another, which may, in the opinion of the court, have some bearing upon the effect to be given in this case to Freeman vs. Howe. Should this court be of the opinion that Freeman vs. Howe does absolutely *and in all cases*, forbid the action of replevin in a State Court against a U. S. Marshal, holding the property of a stranger to the execution record, upon final process, it then becomes important for the defendant in error, to more distinctly call the attention of the court to the other points made

by the defendant in error, and which are not considered in the brief of plaintiff in error, as exchanged.

The printed record, is indefinite, (owing to its arrangement,) in its declaration of what was refused to be found, upon request of defendant in error, as shown upon pages 24 and 25.

The finding of fact and law, requested by defendant in error, and refused, is believed to begin on page 24, f. 56, and end on page 25, f. 59, at the words, "let judgment be entered accordingly." What follows and precedes this requested finding is bill of exceptions only.

* * * * *

Should this court reverse the decision of the Supreme Court of Michigan, and remand the case, the course of subsequent proceedure would seem to be as follows:

The judgment of the State Court, below, for a return of the property replevined, to the custody of the U. S. Marshal would be affirmed.

After this lapse of time, (10 years,) this could not be done. There is no method known to counsel for defendant in error, to compel the U. S. Marshal to receive, in lieu of this property, its money value which in his hands, in accordance with the proceedure indicated in Krippendoorf vs. Hyde, might then be reached, by an ancillary injunction bill in the U. S. Court, notwithstanding the citizenship usually required as a condition of jurisdiction does not exist, and notwithstanding the *supposed* inhibition of Van Nordan vs. Morton.

The Marshal, (following the customary practice) would assign the forthcoming bond, (which by the practice, he could require the sheriff to assign to him) to the plaintiff in execution, and they would or could sue the same in the *state* courts, and must there recover, because of the mandate of this court *non constat*, but that the plaintiffs in execution do now hold by assignment long since made, this forthcoming bond.

The U. S. Courts do not interfere, by injunction with the procedure of *state* courts. As has been said in defendant in error's original brief, by the lapse of time, the action of *trespass* against the Marshal is barred.

Suppose the Marshal, or the plaintiff in execution could, by an ancillary bill, in the U. S. Court, be enjoined from suing on the forthcoming bond, or from assigning it, until he or they should establish the fact of his right to collect the execution out of the property, which by this record is found, after a trial on the merits. to have been (as recited in the opinion of the court—R. p. 51, f. 116) in the *agreed wrongful* possession of the U. S. Marshal, what is to prevent the plaintiffs in execution, suing the defendant in error in the state court, in an action on the case, she being responsible to them for the adjudicated, illegal seizure, by replevin, of her own property?

How would the U. S. Court control and mould such a suit?

Recurring to the fourth and fifth points made in the original brief of defendant in error.

The present clerk of the Supreme Court of Michigan has certified (R., p. 50, f. 115) that he has returned a transcript of *two* records; returned to two writs of error, in the same case. The *first* was issued from the Supreme Court of Michigan May 9, 1876, (R., p. 18, f. 40), and the *second* was allowed February 12, 1880, (R., p. 48, f. 110.)

The proceedings and papers under the *first named writ, seem* to begin with Exhibit A, (R. p. 5, f. 13), and end with the remittur, (R. p. 19, f. 44).

This record embraces,

1 Affidavit for replevin, (R. p. 5, f. 13).

2. The writ of replevin and return thereto, (R. p. 6, f. 14 to 18).

3. The appraisment, (R. p. 8, f. 18 to 23).

4. The declaration, (R. p. 10, f. 23 to 26.

5. The plea in abatement, (R. p. 11, f. 26 to 30).

6. The affidavit for default, (R. p. 13, f. 30 to 31).

7. The default entry, (R. p. 14, f. 31 to 32).

8. The proof of service of plea in abatement, (R. p. 14, f. 32).

9. The stipulation setting aside the default, (R. p. 14, f. 33 to 34).

10. The demurrer to plea in abatement, (R. p. 15, f. 34 to 35).

11. The joinder in demurrer (R. p. 16, f. 36).

12. The judgment on demurrer, (R. p. 16, f 37 to 39).

13. The first writ of error, (R. p. 17, f. 40 to 41).

14. The first assignment of error, (R. p. 18, f. 41 and 42).

15. The *judgment* of the Supreme Court thereon, (R p. 19, f. 43 and 44).

☞ Let it be noted here, that it was competent for the plaintiff in error to have, on *this* trial, plead both in abatement and to the merits; in which case there need not have been the more than three years and eight months interval between the two writs of error.

The Rule of practice, obtaining in that behalf provides,

MICHIGAN CIRCUIT RULES.

"Rule 102. Whenever, in an action of law, the defendant interposes a plea in abatement, he may also, at the same time, plead the general issue; and in such case, if an issue of fact be made on the plea in abatement, such issue shall stand for trial first. If it be found against the defendant, the trial shall at once proceed on the issue on the merits, unless the court, on cause shown, shall allow a postponement. And if the issue on the plea in abatement is tried by jury, the issue on the merits, except when postponement is ordered, shall stand for trial before the same jury.

"When the issue in abatement shall be found for the defendant, the court may, in its discretion, allow the plaintiff to amend the declaration, and the cause shall thereupon proceed on such terms as the court shall prescribe." "Adopted, May 13th, 1869."

The *first* adjudication of the Supreme Court of Michigan did not involve a Federal question. Such question was considered by that court—

Heyman vs. Covell, 36 Mich., 157.

quoted in Appendix "A" to plaintiff in error's brief—but the *decision* was put upon the ground, that the Marshal should have plead (in accordance with the strict *rules governing pleas of that class*,) a judgment back of his execution, against *some* person, and that he had not; neither against the execution defendant, Adolph Heyman, nor the stranger, Sarah Heyman, who had replevined.

Clearly this judgment was right, and the plaintiff in error had his day in court on *that* question. He could, however, have stood on this judgment and *refused* to answer over.

But waiving this right, he plead to the *merits* and gave notice, in the same precise language as that of his plea in abatement, except that he sought to secure the benefit of his faulty plea in abatement, by inserting in his notice (see the last five lines, R. p 20,) an averment that the execution did in fact issue, upon a judgment of court of competent jurisdiction; see also the last two lines of folio 48, to the same purport.

Whether rulings on a plea in abatement come up for review, when after judgment thereon, there has been a plea to the merits, was much considered in the "Dred Scott" case, by all the judges who read opinions.

The general rule was conceded, that a plea to the *merits*, is a waiver of the matter before that plead in abatement; the exception turning in that case, upon the point of the peculiar citizenship jurisdiction of the

courts of the United States. Even in that case, the conflict of opinion is marked.

What return was made to the Supreme Court of the State of Michigan, to the *second* writ of error, issued February 12th, 1880, to the Kent Circuit Court?

There are but two certificates tending to show any return in the case. The first, (R., p. 50, f. 115,) *of date Nov.* 20th, 1880, was *before* the petition to Mr. Justice Swayne for his allowance of the writ or error was sworn, (Nov. 24th, 1880, R., p. 5, f. 11.,) and *before* the writ was allowed, (Dec. 8th, 1880, R., p. 2, f. 3.)

This certificate is "that the foregoing is a true, etc., * * *under both said writs of error.*"

But he does not *separate* them. Can this court?

His last certificate of date Jany. 12th, 1881, (R., p. 53, f. 123,) and evidently the one meant to cover his return to the writ of error here, issued under Mr. Justice Swayne's order in December, 1880, certifies "that the above and foregoing is a true copy of the record filed," (which?) "in said court in said cause, with a copy of the proceedings had therein, "and a copy of the opinion," (which?,) "of said court and the judgment" (which) "entered therein upon the same."

Can we aid the court in their hunt for these two records and returns; we have sought to pick out and give the earlier records, *ante*.

As to the second, we have, beginning on page 20,

1. A plea and notice, without date, or indication of having been filed or used in any court.

2. A judgment, purporting to have been entered February 2d, 1880, upon the filing, (in the nature of a *special* verdict) of written findings of fact and law, made August 4th, 1879, as afterwards *amended* on Decem-

ber 16th, 1879. Judgment was entered "on such findings of fact and law, *as the* same *was* amended." (R., p. 22, f. 49.)

This record discloses no "filed" findings whatever, unless—

3. The bill of exceptions, extending from page 22, f. 50, to and including page 48, f. 109, sufficiently shows such findings, by *recital.* (R., p. 22, f. 51.)

This bill recites, that these findings were at the request of the plaintiff, "afterwards, to-wit, December 16th, 1879, and in pursuance of the order "of this court first had and obtained, *amended* in the words and figures "following."

Then follows the plaintiff's proposed findings of fact and law, (R., pp. 24 and 25), which the court finds that he refuses to find.

Precisely where these proposed findings, which it refuses to find, end, is a matter of inference, (the defendant in error's inference is hereinbefore given) but not of such certainty as should be required, in the Record of the highest court of a State, in review by the highest court of the nation, presumably not desirous of looking for any other than a federal question.

4. Next comes this second writ of error, (R., p. 48, f. 110.)

5. The six assignments of error thereon, (R., p. 59, f. 111 and 112.)

Note 1. Did the Supreme Court of Michigan *adjudge* the fifth and sixth assignments?

Does the *opinion* of that court control that question? We believe not. The *Record* is read here, without it. The rule given in Murdock vs. City of Memphis, 20 Wallace, 590, is as follows:

"If it" (the federal question) "was erroneously *decided*, then this "court must further inquire whether there is any other matter or *issue* "*adjudged* by the state court, sufficiently broad to maintain the *judg-* "*ment*, notwithstanding the error in the decision of the federal question. "If this be found to be the case, the *judgment* must be affirmed, without

"examination into the soundness of the decision" (judgment) "of such "other matter or *issue*."

6. This final *judgment* (R., p. 50, f. 114.)

Note 2. The Supreme Court of Michigan had before it, (1), the knowledge of a plea in abatement, raising a federal question and its abandonment by a plea to the merits. (2.) *All* the evidence, showing an acceptance of a bond in lieu of the property held, and the *voluntary* surrender of the property by the parties in interest. (3.) It also had a formulated special verdict or finding, proposed and refused, and it had power to rectify that refusal, and make the refused finding the legal and *final* one.

(4.) It had before it the fact, that upon a trial, *on the merits*, after federal question, was *legally* abandoned, no attempt, even, was made, to show the property held to be the property of the execution debtor.

☞ All this, at least, is crystalized and held, in the *judgment*. The greater contains the less. The judgment ranks the opinion.

If the question of federal protection, which goes to the whole right of action is *not* proper matter for plea in abatement, then is there no *force*, in the language of the 25th section of the Judiciary Act, as modified by the act of February 5th, 1867, which gives this court jurisdiction, when "the title, right, privilege or exemption is *specially set up* or claimed."

7. Then follows the first certificate of the clerk of date before the allowance of the writ of error by Mr. Justice Swayne.

8. Then there is "*Exhibit B.*," the opinion of the court. It is one of the papers submitted to the justice allowing the writ, (R., p. 4, f. 9,) although it is authenticated, by—

7. The *last* certificate of the clerk, (R., p 53, f. 122) of date January 12th, 1881, more than a month after the date of petition with which it was used.

During all this long controversy, with two trials in the Circuit and two

hearings in the State Supreme Court, and now the fifth hearing here, there is found not a word of testimony nor a paper pretence, that questions the absolute and sole ownership, by a brotherly deed of gift, of the replevined property by the defendant in error.

Unfortunately caught between the upper and nether mill-stones of federal and state jnrisdiction, she has been ground there since 1874.

Has she not a right to assume, that this court will at last give her final release, and affirm this *honest* judgment, without *serious* danger to the principle of federal supremacy, in which in these latter days we detect no remarkable flavor of mild decay.

L. D. NORRIS,
Counsel for Defendant in Error.